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Notes and Comments

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Anti-trust Laws—Robinson-Patman Act—Price Discrimination—Proportionally Equal Terms

In 1936, Congress enacted the Robinson-Patman Act[1] in an endeavor to plug the holes in the anti-trust dike concerning price discrimination.[2] Some observers seemed confident at the time the Act was passed that its "intent" was clear.[3] However, subsequent events have revealed many ambiguities. One writer has been prompted to remark that "There is a law suit in literally every word of it."[4]

The phrase "proportionally equal terms," in subsections (d) and (e),[5] has been characterized as a "legislative monstrosity"[6] because of its ambiguities. The source of the trouble is that these sections purport to prescribe a standard for determining what constitutes equality in the granting of services or facilities but no actual standard is given. The payments or services must be made to different purchasers on "proportionally equal terms." The Federal Trade Commission has been given wide latitude to determine what constitutes "proportionally equal terms." This "blank check" has left the Act without a definite standard and has

[1] 49 STAT. 1526 (1938), 15 U. S. C. § 13 (Supp. 1952).

[2] An excellent discussion of the legislative history of the Robinson-Patman Act may be found in: Evans, *Anti-Price Discrimination Act of 1936*, 23 VA. L. REV. 140 (1936); NOTES, 36 COL. L. REV. 1285 (1936); 50 HARV. L. REV. 106 (1936).

[3] Mr. Commissioner Ayres, Chairman of the Commission in 1937, said of the new legislation: "I do not contend that the Act is without imperfections, but I do believe that any business man who desires and conscientiously endeavors to keep within its provisions will have little trouble in doing so. Its purpose and intent are clear." NORWOOD, TRADE PRACTICE AND PROCEDURE LAW (1938).

[4] GORDON, CONFERENCE PROCEEDINGS ON THE ROBINSON-PATMAN ANTI-DISCRIMINATION ACT, p. 21 (1936). Some Senators were confused as to its purport. 80 CONG. REC. 6429 (1936). *But see* note 11, *infra*.

[5] 49 STAT. 1526 (1938), 15 U. S. C. § 13 (Supp. 1952):

Subsection (d): "It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale by such person, unless such payment or consideration is available on *proportionally equal terms* to all other customers competing in the distribution of such products or commodities." Subsection (e): "It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on *proportionally equal terms*." [Italics added.].

[6] Oppenheim, *Should the Robinson-Patman Act Be Amended?* CCH ROBINSON-PATMAN ACT SYMPOSIUM 141, 146 (1948). At the Conference Proceedings on the Robinson-Patman Act held in New York on July 8, 1936, Mr. Gordon stated: "The only definite thing about the phrase . . . is that it is indefinite."

led to attacks in the courts. But so far these provisions have withstood assault.[7] The purpose of this note is to inquire into the possible ratios which may come within the purview of "proportionally equal terms."

In the case of *Elizabeth Arden Sales Corporation v. Gus Blass,*[8] the appellant advanced, in theory, the ratio of "dollar volume of purchases made."[9] Had the figures of the appellant been correct[10] and the allowances offered to each of the companies graduated to shift throughout

[7] Subsection (e) was attacked on the ground of being unconstitutional in Elizabeth Arden, Inc., v. Federal Trade Commission, 156 F. 2d 132 (2d Cir. 1946), *cert. denied,* 331 U. S. 806. The Court of Appeals, in ruling against the petitioner, stated: "We reject the contention that the standard in section (e) is so indefinite that men of common intelligence cannot adequately grasp its meaning and therefore it is invalid as an improper delegation of legislative power and violative of due process."

[8] 150 F. 2d 988 (8th Cir. 1945), *cert. denied,* 326 U. S. 773. Here appellant, a Delaware corporation, was the distributing and sales company of Eliabzeth Arden, Inc., a manufacturer of cosmetics. Appellee owned and operated a department store in Little Rock, Ark., said store containing a cosmetic and toilet-goods department. In 1938 appellee, via an oral contract with appellant, began to carry the Elizabeth Arden line of products. It was agreed that appellant would pay one half of the salary of a "demonstrator" in appellee's store amounting to $10 per week, said "demonstrator" to push the sales of Elizabeth Arden products when it was possible to do so. At other times this "demonstrator" was to wait on the general trade. This arrangement remained in effect for two years at which time the appellant discontinued selling Elizabeth Arden cosmetics to the appellee and in lieu of the appellee, the appellant began selling to the M. M. Cohn Co., another department store in Little Rock, Ark., and a competitor of appellee. The Cohn Co. had been handling Elizabeth Arden cosmetics during the period that the appellee handled them and the appellee knew of this. However, the appellant failed to disclose to the appellee that he (appellant) had been paying *all* of the salary of the "demonstrator" for the M. M. Cohn Co., a total of $20 per week. Appellee seeks to recover three fold the difference between the amount of the allowances made and the value of the services furnished to Cohn and those to the appellee. The trial court had held in favor of the appellee for $10 per week for 101 weeks or an aggregate of $1,010.00.

[9] Appellant seeks to substantiate his case by stating, in the language of the court that ". . . taking the total amount of products purchased by Cohn Co. over the entire period involved, in the sum of $18,593.40, and the total amount purchased by the appellee, in the sum of $11,250.35, then deducting the amount of goods, in the sum of $2,463.04, which Cohn Co. took off appellee's hands, . . . and finally comparing the net figure of $8,787.51 for appellee with the figure of $18,593.40 for Cohn Co.," there is a ratio of proportionality set up as the dollar volume purchased by each of the two companies. Converting his dollar volume purchased into percentages, appellant contends that since Cohn Co. did more than 67% of the business and appellee received much more than a proportionate share of the salary, i.e. 50% instead of 33%, appellant is in the clear and the appellee is in no position to contend that he has been slighted or a violation of the law has occurred.

[10] However, the court found a number of fallacies in the appellant's argument, including some discrepancies in appellant's figures. They stated: ". . . In the next place appellant's retrospective effort to adopt appellee's entire purchasing period as the base for testing the question of proportional treatment in relation to the amount of goods bought is purely artificial, for the evidence does not show that its policy of furnishing clerk's services or paying clerk's salaries ever was related to such a base. In passing, it may also be noted that, if appellant had undertaken to make a comparison of purchases by a calender year, appellee's purchases for the period that it handled appellant's products in 1938 would have shown $5,117.78 as against $3,834,83 for Cohn Co., and if a fiscal year had been taken commencing with the date that appellee began handling appellant's products it would have shown purchases of $7,086.86 by appellee during that specific period as against $7,575.82 by Cohn Co."

the business relationship so as to mirror their true value, the Commission probably would have upheld appellant's contention.[11] However, in reality, the appellant's facts indicate that the ratio which he in fact advanced was one of his own discretion and favor. This was rejected as being merely an arbitrary arrangement. The court stated: "That which was discriminatory under the statute when done, cannot subsequently, in order to enable the seller to escape damages the discrimination, be artificially tailored into proportionally equal terms by fitting it to some imaginary basis or standard that has never in fact existed."[12] Even though the court does not go into all the ramifications of "proportionally equal terms," it does infer that the proportionality must have a sound basis of existence, not a mere arbitrary arrangement, and such basis must have its birth not later than co-existent with the furnishing of the service or facility.

[11] The Court approved the Commission's cease and desist order which stated: "The statute affords the seller a free election in the first instance as to what services or facilities, if any, he will provide to purchasers of his products; but having elected to furnish a particular service or facility to a particular purchaser or puchasers, he thereby assumes the obligation of according similar services to all competing purchasers to the extent required by the statute. The furnishing of a service or facility which cannot be proportionalized for the benefit of competing purchasers, or, in the alternative, the failure or refusal to proportionalize the terms upon which services or facilities are granted, so as to make it reasonably possible for competing purchasers to avail themselves of such services or facilities if they desire to do so, constitutes a failure to accord such services or facilities upon proportionally equal terms."

Both the Committees of the Senate and the House of Representatives, explaining the meaning of "proportionally equal terms," concurred: "Where a competitor can furnish them (i.e., services or facilities) in less quantity but of the same relative value, he seems entitled, and this clause is designed to accord him, the right to a similar allowance commensurate with those facilities. To illustrate: Where, as was revealed in the hearings . . . , a manufacturer grants to a particular chain distributor as advertising allowance of a stated amount per month per store in which the former's goods are sold, a competing customer with a smaller number of stores, but equally able to furnish the same service per store, and under conditions of the same value to the seller, would be entitled to a similar allowance on that basis." SEN. REP. No. 1502, 74th Cong., 2d Sess. (1936); H. R. REP. No. 2287, 74th Cong., 2d Sess. (1936).

Furthermore, Senator Logan, who was in charge of the bill on the floor of the Senate, stated: "But if the seller grants an advertising allowance to one customer there is no reason why he should not grant, under identical circumstances, the same allowance to another customer based upon the quantity of the purchases. If one man buys $100,000 in goods and should be allowed $1,000 for advertising purposes, and another buys $10,000 in goods, he ought to be allowed $100 for advertising. That is not prohibited by the bill. So long as the same advertising allowances are made proportionately on the amount of purchases there is no prohibition in the bill against them." 80th CONG. REC. 3231 (1936). Congressman Utterback, who was in charge of the bill on the floor of the House stated: "But proportional to what? Proportional naturally to those customers' purchases and to their ability and equipment to render or furnish the service or facilities to be paid for." 80th CONG. REC. 9558 (1936). This would seem to be an indorsement of both the instant ratio," Dollar Volume Purchased" and also "Quantity Purchased Ratio," which will be discussed later.

[12] 150 F. 2d 988, 994 (8th Cir. 1945), *cert. denied*, 326 U. S. 773 (1945).

However, the "dollar volume purchased ratio"[13] is not, as a matter of law, the only basis upon which allowances or facilities may be tendered.

Another possible ratio may be found in quantities purchased. A recent survey by the American Law Institute stated: ". . . merchandising payments and services may be considered granted on proportionally equal terms when the payments are made or the services furnished in proportion to the respective quantities of goods purchased by different purchasers."[14] Thus, if *A* sold *B* 100 car loads of potatoes and gave *B* $100 to use for advertising for the sale of the potatoes, *C*, a competitor of *B*, who bought 50 car loads of potatoes, would be entitled to $50 for use in advertising the potatoes.[15]

Still another method of equalizing payments or services in a logically valid ratio is by making such payments or services in proportion to specified services furnished by the buyers without relation to the volume of goods purchased, either dollar volume or volume purchased.[16] For

[13] Laton, "Demonstrators on Proportionally Equal Terms," CCH Robinson-Patman Act Symposium, 38, 44 (1948).

Elizabeth Arden Sales Corporation v. Gus Blass, 150 F. 2d 988 (8th Cir. 1945), *cert. denied*, 326 U. S. 773; *accord*, Elizabeth Arden, Inc., v. Federal Trade Commission, 156 F. 2d 132 (2d Cir. 1946), *cert. denied*, 331 U. S. 806. In the last case cited, petitioner sought to have the court review an order by the Federal Trade Commission holding a violation of 2(e) of the Robinson-Patman Price Discrimination Act. The facts were that petitioner sold a "prestige" line of cosmetics in the several states to stores judged by petitioner to have facilities and appropriate services to merchandise the cosmetics in such a way which would appeal to customers having exclusiveness and fashion as buying motives. To their more important stores, which constituted less than 10% of the total number of stores, petitioners furnished "demonstrator" service, paying all or part of the salary to such "demonstrators." To the remaining 90% of their customers, who bought some 60% of petitioner's total sales, no "demonstrator" service was given. The terms which kept the 90% from being accorded this service were their inability to " 'cooperate' satisfactorily with petitioners by reciprocally furnishing to them . . . services and facilities to promote the resale of Arden cosmetics, such as carrying a representative stock, making available counter-displays, advertising once or twice a month . . . etc." The evidence tended to show that where the "demonstrators" were furnished, the sales of the Arden line of cosmetics increased, "sometimes as much as tripled." Upon this evidence, the Commission found that petitioners had violated the Act, since the subsection "required a seller who elected to furnish any service or facility to any purchaser to proportion both service or facility and terms so as not to exclude any competitive purchaser." In upholding the Commission, the court refused to read the limitation of an injurious effect upon competition of subsection (a) into subsection (e). Thus, subsection (e) is construed to be a per se violation, as is subsection (d), the only defense being a flat denial of the charge. In the instant case, petitioner tried unsuccessfully to use subjective considerations such as prestige value of the displays, etc. as a basis for proportioning the "demonstrators." The court rejected this as being much too arbitrary.

[14] AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT, 132 (1950).

[15] Although there have been no court decisions holding the "Quantity Purchased Ratio" to be a valid standard, this would seem to follow from Congressman Utterback's statement, note 11, *supra*. It is contended that not only should $50 be available for *C*'s use in advertising *A*'s potatoes but also an alternative, that is a $50 equivalent in value. See notes 20 and 23, *infra*.

[16] Feldman & Zorn, "Advertising and Promotional Allowances," Bureau of National Affairs (1948).

example, *A* agrees to pay *B* at the rate of $10 per week per square foot of window space for a maximum of 10 square feet for the exclusive display of *A's* product for a period not to exceed four weeks. Therefore, *B* receives $100 per week or $400 for the four week period. Now, suppose *C*, a competitor of *B*, has only five square feet of window space. If *C* agrees to display *A*'s goods for two weeks, under this ratio *C* will be entitled to $50 per week or $100 for the two weeks. But, even so, *C* is still receiving the payments from *A* at the same rate of $10 per square foot for four weeks, i.e., the same rate as that of *B*.

A similar situation would arise under the instant ratio if *S*, Seller, agreed to pay *B*, Buyer, for specified local advertising of *S*'s product a sum not to exceed $100 per week which is to be 50% of the Buyer's cost of such advertising for a maximum of four weeks. If *X*, a competitor of *B* and a purchaser from *S*, had the same agreement with *S* and wished to advertise for only two weeks and to buy local advertising at a total cost of $100 per week, *S* under this agreement would pay $50 for each of the two weeks. Thus, *S* is paying the 50% of the local advertising of each buyer, both *B* and *X*, in proportion to the reciprocal advertising service expense incurred by the buyers.

Conceding the above ratios to be proportional, there is still a strict requirement which must be complied with. The reciprocal services or facilities required of the purchasers for participation in the plan must be within the ability of the smallest competing purchasers to furnish. As the Commission stated in its findings in the *Elizabeth Arden* case:[17] "The furnishing of a service or facility which cannot be proportionalized for the benefit of competing purchasers or, in the alternative, the failure or refusal to proportionalize the terms upon which services or facilities are granted, so as to make it reasonably possible for competing purchasers to avail themselves of such services or facilities if they desire to do so, constitutes a failure to accord such services or facilities upon proportionally equal terms. The phrase 'upon terms not accorded to all purchasers on proportionally equal terms' contemplates the proportionalization of the terms, and this necessarily includes the proportionalization of the service or facility as well."

It is nowhere stated in subsection (d)[18] that the payments made to competing customers for services in return must be for services of the same type. Nor does subsection (e)[19] provide that services furnished to all purchasers must be of the same type. Thus, it has been stated: "The way is left open to offer alternative terms to smaller purchasers to suit their abilities, or alternative services to suit their needs."[20] This

[17] 39 F. T. C. 288, 302 (1944).

[18] See note 5, *supra*.

[19] See note 5, *supra*.

[20] "For example, a manufacturer who has arranged with certain large purchasers to pay all or a part of the cost of their newspaper and radio advertising, might meet the 'proportionally equal terms,' requirement by offering payments to smaller purchasers for providing window displays, distributing handbills, etc. If the co-

would seem to be only conjecture, however, since the courts have not read into the provision such a liberal interpretation. Even so, it would seem logical as well as practical since, if a company agreed to paint delivery trucks with the name of their product inscribed thereon for use by a distributor, without such a liberal interpretation, the company would be supposed to furnish identical services to other distributors who made no use of trucks whatsoever.

However, the Federal Trade Commission, dividing 3-2, has attempted to alleviate the situation in the Cosmetic Industry.[21] In 1951 the Commission issued certain rules for the Cosmetic Industry. One in particular was aimed at solving the problem of offering demonstrator services by the manufacturers of cosmetics to all retail members of the industry on terms of equality.[22] The majority of the Commission realized that too liberal an interpretation of the proportioning of demonstrator services would lead to obvious absurdities.[23] The dissent contended that the statute furnished no basis for any provision concerning alternative types of promotional services. It seems clear that expediency and practical necessity have emerged the victor over mere form and, therefore, the rule as now promulgated is that where the demonstrator service is not suitable to the facilities of one particular customer-[24]purchaser,[25] an

operative merchandising services which the seller requires of large customers are of a type which small customers cannot furnish, the terms offered should provide for proportional benefits to the latter conditioned on the furnishing of alternative services within their ability to render." AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT 136 (1950).

[21] F. T. C. Trade Practice Rules for the Cosmetic and Toilet Preparation Industry, 16 Fed. Reg. 11,993 (1951), 3 CCH TRADE REG. REP. (9th ed.) ¶ 20,282 (1951).

[22] These rules, called "Group I" rules, set out those things which the Federal Trade Commission consider to be illegal within the industry as distinguished from "Group II" rules which merely set out those practices that are undesirable within the industry. Thus, " 'Group I' Trade Practice Rules merely express the understanding of the F. T. C. as to what conduct is illegal under the statutes within its jurisdiction, in an endeavor to secure voluntary compliance and avoid individual cease-and-desist proceedings." 65 HARV. L. REV. 1261, 1262 (1952).

It is to be noted that these Trade Practice Rules must be viewed principally as the weather forecast of "administrative wind" that the F. T. C. intends to follow and not a reliable statement of existing law. That this latter statement is true is evident from the fact that these rules do not grant immunity from prosecution but they do help the industry form policies.

[23] "As an example of eventual absurdity, if a girl demonstrator were employed in a department store, it might be contended that the law would be violated unless proportionate services of the same girl would be provided for every small drug store within range of that competition. And then, to continue on this road toward absurdity, we might have to find some means of measuring the energy and enthusiasm of the girl when she worked for a department store, as compared with when she worked for a drug store. . . . Absurdities could be piled upon absurdities, if it were necessary to prove that any such interpretation of the law was not intended by the Congress." ANNUAL SURVEY OF AMERICAN LAW, 291 (1952).

[24] See note 7, *supra*. "It shall be unlawful . . . unless such payment or consideration is available on proportionally equal terms to all other *customers* . . ." § 13(d). (Italics added.)

[25] See note 7, *supra*. "It shall be unlawful . . . or offering for sale of such commodity so purchased upon terms not accorded to all *purchasers* on proportionally equal terms." § 13(e). (Italics added.)

"alternative type of promotional service or facility which is of equivalent measurable cost"[26] may be substituted in its place.

It could be argued with some merit that the same type of policy rules should apply to other industries inasmuch as their problems, in part, are not unlike those in the Cosmetic Industry.

Although the Commission and the courts have indirectly approved only one interpretation of the phrase "proportionally equal terms," this is by no means the only ratio that would be valid under the Act. The real hope of the phrase lies not in its ambiguous past nor its equally uncertain present but in future liberal constructions which the judicial and administrative bodies must, of necessity, place upon it.

EDWIN S. PRESTON, JR.

Criminal Law—Former Jeopardy—Discharge of Jury Held to Bar Subsequent Prosecution

Defendant was on trial for murder. At the end of the third day of the trial the jurors were taken to a local hotel for the night. During the night, the police, upon being called to investigate the conduct of the jurors, found three in an intoxicated condition. When court was convened the next day, in the absence of the jury and upon the testimony of the officers, the judge withdrew a juror and declared a mistrial. The defendant objected to the order of mistrial, and upon the court's overruling the objection, duly excepted. At a later trial the defendant was convicted of manslaughter, the court overruling a plea of former jeopardy, to which the defendant duly excepted. On appeal, the Supreme Court in a unanimous decision vacated the judgment, held the order of mistrial improper and sustained the defendant's plea of former jeopardy[1]

The principle that a person shall not be twice put in jeopardy for the same offense is deeply rooted in American jurisprudence.[2] It is well established that jeopardy attaches when a competent jury is sworn

[26] See note 23, *supra*.

[1] State v. Crocker, 239 N. C. 446, 80 S. E. 2d 243 (1954). The city police officers testified that they observed three jurors moving along the halls of the hotel in an intoxicated condition. The sheriff testified that he observed one of the jurors in an intoxicated condition either from alcoholic beverages or narcotic drugs, and had to threaten arrest before the juror would become quiet and re-enter his room.

[2] The Federal Constitution and all of the state constitutions, except the Constitutions of Connecticut, Maryland, Massachusetts, North Carolina, and Vermont, contain prohibitions against double jeopardy. The states that do not have a constitutional provision have the principle as a part of their common law. State v. Benham, 7 Conn. 414 (1829); Gilpin v. State, 142 Md. 464, 121 Atl. 354 (1923); Commonwealth v. McCan, 277 Mass. 199, 178 N. E. 633 (1931); State v. Clemmons, 207 N. C. 276, 176 S. E. 760 (1934); State v. O'Brien, 106 Vt. 97, 170 Atl. 98 (1934). See A. I. L., *Administration of the Criminal Law*, Commentary to § 6 (Proposed final draft for 1935) for a complete listing of the Constitutional provisions.

and impaneled to try the case.[3] If the discharge of the jury and the declaration of a mistrial is at the instance or with the consent of the defendant, this constitutes a waiver, and he cannot later maintain a plea of former jeopardy.[4]

Early decisions gave the courts little authority to discharge the jury and declare a mistrial for any cause, without prejudicing the state's right to proceed again.[5] However, the strict rule of those decisions has been greatly relaxed and the present-day rule is that a trial judge may discharge a jury and declare a mistrial without working an acquittal of the defendant when there is a manifest necessity or when justice would be better served under the circumstances.[6] North Carolina classifies the types of necessity warranting the discharge of the jury into two kinds: "physical necessity" and the "necessity of doing justice."[7] Necessity for a mistrial arising from misconduct of one or more of the jurors might well fall into either class.[8]

The impossibility of defining all of the circumstances under which

[3] Westover v. State, 66 Ariz. 145, 185 P. 2d 315 (1947); State *ex rel.* Larkins v. Lewis, 54 So. 2d 199 (Fla. 1951); State v. Hutter, 145 Neb. 798, 18 N. W. 2d 203 (1945); State v. Bell, 205 N. C. 225, 171 S. E. 50 (1933); 22 C. J. S., *Criminal Law* § 241 n. 64 (1940).

[4] Barrett v. Bigger, 57 App. D. C. 81, 17 F. 2d 669 (1927), *cert. denied,* 274 U. S. 752 (1927); Westover v. State, 66 Ariz. 145, 185 P. 2d 315 (1947); People v. Agnew, 77 Cal. App. 2d 748, 176 P. 2d 724 (1947), *cert. denied,* 337 U. S. 909 (1949), *rehearing denied,* 337 U. S. 927 (1949), *rehearing again denied,* 338 U. S. 842 (1949); Kamen v. Gray, 169 Kan. 664, 220 P. 2d 160 (1950), *cert. denied,* 340 U. S. 890 (1950); State v. Dry, 152 N. C. 813, 67 S. E. 1000 (1910); Etter v. State, 185 Tenn. 218, 205 S. W. 2d 1 (1947); Chamberlain v. State, 146 Tex. Cr. R. 300, 174 S. W. 2d 604 (1943).

[5] Atkins v. State, 16 Ark. 568 (1855) (urgent necessity); McCorkle v. State, 14 Ind. 39 (1859) (imperious necessity); State v. Bass, 82 N. C. 570 (1880) (great necessity); State v. Ephraim, 19 N. C. 162 (1836) (*evident, urgent, overruling necessity arising from matters beyond human foresight and control*). The Supreme Court of the United States had earlier indicated a relaxation of the rule, in holding that a mistrial could be proper where the ends of justice would otherwise be defeated. United States v. Perez, 9 Wheat. 579 (U. S. 1824).

[6] "We think, that in cases of this nature, the law has invested courts of justice to discharge the jury from giving any verdict, whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of justice would otherwise be defeated." United States v. Perez, 9 Wheat. 579, 580 (U. S. 1824); *accord,* Maddox v. State, 230 Ind. 92, 102 N. E. 2d 225 (1951); Baker v. Commonwealth, 280 Ky. 165, 132 S. W. 2d 766 (1939); *Ex parte* Earle, 316 Mich. 295, 25 N. W. 2d 202 (1946); State v. Bowman, 231 N. C. 51, 55 S. E. 2d 789 (1949); State v. Beal, 199 N. C. 278, 154 S. E. 604 (1930); State v. Cain, 175 N. C. 825, 95 S. E. 930 (1918); State v. Upton, 170 N. C. 769, 87 S. E. 328 (1915); State v. Tyson, 138 N. C. 627, 628, 50 S. E. 456 (1905) ("It is well settled and admits of no controversy that in all cases, capital included, the court may discharge a jury and order a mistrial when it is necessary to attain the ends of justice."); Yarborough v. State, 90 Okla. Cr. R. 74, 210 P. 2d 375 (1949); State v. Brunn, 22 Wash. 2d 120, 154 P. 2d 826 (1945).

[7] State v. Beal, 199 N. C. 278, 154 S. E. 604 (1930); State v. Tyson, 138 N. C. 627, 50 S. E. 456 (1905); State v. Bell, 81 N. C. 591 (1879); State v. Wiseman, 68 N. C. 203 (1873).

[8] See State v. Tyson, 138 N. C. 627, 50 S. E. 456 (1905) (juror, because intoxicated, was physically unfit to continue: too, the ends of justice would be defeated if he were allowed to serve).

a discharge of the jury and an order of mistrial would be proper requires that this power rest in the sound discretion of the trial judge.[9] It is generally held that the discharge of the jury will not be reviewed unless there is a clear abuse of this discretion.[10] A few jurisdictions,[11] including North Carolina,[12] require the trial judge to find the facts upon which the order was based and set them out in the record in order that they may be reviewed by the appellate court upon the application of the defendant. In North Carolina, however, the finding of fact is required, and review of an order of mistrial allowed, only in capital felonies.[13] Hence a plea of former jeopardy is not available in misdemeanors and non-capital felonies in the absence of a showing of "gross" abuse[14] of discretion, since it is a non-reviewable matter resting in the discretion, of the trial court.[15]

[9] Simmons v. United States, 142 U. S. 148 (1891); United States v. Perez, 9 Wheat. 579, 580 (U. S. 1824) ("They [trial courts] are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere."); *In re* Ascher, 130 Mich. 540, 90 N. W. 418 (1902); State v. Bowman, 231 N. C. 51, 55, S. E. 2d 789 (1949); State v. Beal, 199 N. C. 278, 154 S. E. 604 (1930); State v. Tyson, 138 N. C. 627, 50 S. E. 456 (1905); State v. Wiseman, 68 N. C. 203 (1873); State v. Barnes, 54 Wash. 493, 103 Pac. 792 (1909). *But cf. In re* Spier, 12 N. C. 491 (1828) and State v. Garriques, 2 N. C. 241 (1795) where the discretionary power of the trial judge was denied.

[10] United States v. Perez, 9 Wheat. 579, 580 (U. S. 1824) ("But, after all, they [trial courts] have the right to order the discharge; and the security which the public have for faithful, sound and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office."); Andrews v. State, 174 Ala. 11, 56 So. 998 (1911); People v. Simos, 345 Ill. 226, 178 N. E. 188 (1931); *Ex parte* Earle, 316 Mich. 295, 25 N. W. 2d 202 (1946); State v. Barnes, 54 Wash. 493, 103 Pac. 792 (1909).

[11] State v. Leunig, 42 Ind. 541 (1873); State v. Klauer, 70 Kan. 383, 78 Pac. 802 (1904); People v. Parker, 145 Mich. 488, 108 N. W. 999 (1906); State v. Conklin, 25 Neb. 784, 41 N. W. 788 (1889); Yarborough v. State, 90 Okla. Cr. R. 74, 210 P. 2d 375 (1949); State v. Bilton, 156 S. C. 324, 153 S. E. 269 (1930); State v. Whitman, 93 Utah 557, 74 P. 2d 696 (1937).

[12] Finding of facts and setting them out in the record is emphasized in the North Carolina cases. See State v. Beal, 199 N. C. 278, 154 S. E. 604 (1930); State v. Cain, 175 N. C. 825, 95 S. E. 930 (1918); State v. Tyson, 138 N. C. 627, 50 S. E. 456 (1905); State v. Bailey, 65 N. C. 426 (1871).

[13] State v. Dove, 222 N. C. 162, 22 S. E. 2d 231 (1942); State v. Beal, 199 N. C. 278, 154 S. E. 604 (1930); State v. Tyson, 138 N. C. 627, 50 S. E. 456 (1905). This rule seems peculiar to North Carolina. *But cf.* State v. Bailey, 65 N. C. 426, 428 (1871) ("In inferior misdemeanors, such as assaults, batteries, forcible trespass and the like, the Judges have a discretionary power to order mistrials, and in such cases their decisions cannot be reviewed by this Court, but even here mistrials should not be granted for slight causes. But in capital felonies, and in felonies not capital, and in misdemeanors where infamous punishments may be inflicted, as in perjury, conspiracy, and the like, the decisions of the Judges in the Court below may be reviewed in this Court. In such cases the Judges should find the facts, which this Court cannot review; but the law bearing upon the facts thus found are the subject of review in this Court by an appeal after the final decision in the Court below.").

[14] State v. Andrews, 166 N. C. 349, 81 S. E. 416 (1914).

[15] State v. Guice, 201 N. C. 761, 161 S. E. 533 (1931); State v. Ellis, 200 N. C. 77, 156 S. E. 157 (1930); State v. Upton, 170 N. C. 769, 87 S. E. 328 (1915); State v. Wiseman, 68 N. C. 203 (1873). *But cf.* State v. Bailey, 65 N. C. 426 (1871).

If the jury is discharged over the objection of the defendant, and on review it is determined that the surrounding circumstances and facts did not in fact necessitate an order of mistrial, the reasons for the action being legally insufficient, the plea of former jeopardy will be allowed.[16]

No definite rule can be formulated which will encompass all of the different types of misconduct which will be declared to be legally sufficient to support an order of mistrial. Each case must rest on its own surrounding facts and circumstances.[17] However, a juror's misconduct on *voir dire* examination has been held to be misconduct sufficient to sustain the withdrawal of a juror more often, perhaps, than any other type of juror misconduct. Thus, in cases where a juror has falsely sworn that he was not acquainted with the defendant;[18] withheld the fact that he was friendly[19] or partial[20] to the defendant; concealed other facts;[21] revealed that he had not told the truth concerning his scruples as to conviction on circumstantial evidence;[22] and where he has fraudulently gained access to the jury for the purpose of acquitting the defendant,[23] the withdrawal of a juror and the declaration of a mistrial over the defendant's objection has been sustained.

Other types of misconduct by members of the jury which have been held sufficient to sustain the withdrawal of a juror and the declaration of a mistrial include: a juror's becoming separated from the other members of the jury;[24] intoxication of a juror during trial[25] and during recess;[26] a juror's procuring liquor for other jurors;[27] a juror's asso-

[16] State *ex rel.* Manning v. Hines, 153 Fla. 711, 15 So. 2d 613 (1943); Jordan v. State, 75 Ga. App. 815, 44 S. E. 2d 821 (1947); Maddox v. State, 230 Ind. 92, 102 N. E. 2d 225 (1951); Kamen v. Gray, 169 Kan. 664, 220 P. 2d 160 (1950), *cert. denied*, 340 U. S. 890 (1950); Mullins v. Commonwealth, 258 Ky. 529, 80 S. E. 2d 606 (1935); State v. Prince, 63 N. C. 529 (1869).

[17] For a collection of cases and situations where the jury was discharged over the defendant's objection, see, WHARTON, CRIMINAL LAW, Vol. I, § 394 (1912).

[18] Simmons v. United States, 142 U. S. 148 (1891).

[19] Helton v. State, 255 S. E. 2d 694 (Tenn. 1953).

[20] Quinton v. State, 112 Neb. 684, 112 N. W. 881 (1924).

[21] *In re* Ascher, 130 Mich. 540, 90 N. W. 418 (1902).

[22] State v. Cain, 175 N. C. 825, 95 S. E. 930 (1918).

[23] State v. Washington, 89 N. C. 535 (1883) (without defendant's knowledge); State v. Bell, 81 N. C. 591 (1879) (at the instance of the defendant).

[24] Etter v. State, 185 Tenn. 218, 205 S. W. 2d 1 (1947).

[25] *In re* Ascher, 130 Mich. 540, 90 N. W. 418 (1902); State v. Tyson, 138 N. C. 627, 50 S. E. 456 (1905) (upon examining the juror, judge found him to be in a "nervous and besottled condition" and unfit to continue).

[26] Fetty v. State, 119 Neb. 619, 230 N. W. 440 (1930) (juror found unfit for duty after being jailed for public drunkenness); State v. Tyson, 138 N. C. 627, 50 S. E. 456 (1905) (juror drank before the trial, during the trial, and during recess). For a note concerning drunkenness of jurors and subsequent mistrials, see 9 NEB. L. BULL. 215 (1930).

[27] *In re* Ascher, 130 Mich. 540, 90 N. W. 418 (1902). This is an extreme example of misconduct on the part of the jurors; they concealed facts on *voir dire* examination, made statements showing prejudice, got the bailiff intoxicated, procured liquor for others, drank, and were found guilty of unauthorized communications.

ciation with an interested person;[28] and a juror's public statements indicating his unfitness for duty after he had been impaneled.[29] Conversely, where the bailiff bought beer at defendant's saloon which he gave to the members of the jury;[30] or where the foreman spoke briefly to the complaining witness;[31] and where a juror during a recess wandered away from the custody of the officer in charge and visited a nearby restaurant,[32] it has been held that the surrounding facts and circumstances did not constitute sufficient misconduct to sustain an order of mistrial over the defendant's objection.

In the light of the former jeopardy provisions of our constitutions and decisions,[33] it is obvious that extreme caution should be used in ordering discharge of a jury for alleged misconduct of one or more of its members. A mistrial should be ordered only under urgent circumstances, and especially in capital cases, only after a plain and obvious cause has been shown to exist.[34] When the misconduct of the juror or jurors occurs outside the courtroom and not in the presence of the judge, a competent judicial inquiry is necessary to determine the existence of a necessity for a mistrial.[35]

Thus, where mere convenience is concerned, or where the conduct is an irregularity only, and where the trial judge does not properly investigate the surrounding circumstances, it is error to withdraw a juror and declare a mistrial and a plea of former jeopardy should be sustained.[36]

[28] People v. Bigg, 237 Mich. 58, 297 N. W. 70 (1941); People v. Diamond, 231 Mich. 484, 204 N. W. 105 (1925).

[29] People v. Schepps, 231 Mich. 260, 203 N. W. 882 (1925) (juror stated publicly that he thought confining the jurors reflected on his honor and thereby prejudiced him against the state); People v. Sharp, 163 Mich. 79, 127 N. W. 758 (1910) ("When I am on a jury and I get my mind made up, by ——, it will take more than they have got to change it."); State v. Rector, 166 S. C. 335, 164 S. E. 865 (1931) (juror's statement that he would disregard incriminating testimony because the witness was a Negro).

[30] State v. Leunig, 42 Ind. 541 (1873) (jurors were taken by the bailiff, contrary to the orders of the court, to the public square, where he left them, and procured beer for them from defendant's saloon. The judge ordered a discharge of the jury, but on appeal this was reversed, the facts presenting no necessity for such discharge).

[31] People v. Fishman, 64 N. Y. Misc. 256, 119 N. Y. Supp. 89 (Gen. Sess. 1909).

[32] Mullins v. Commonwealth, 258 Ky. 529, 80 S. W. 2d 606 (1935).

[33] See note 2 *supra.*

[34] United States v. Perez, 9 Wheat. 579 (U. S. 1824); *In re* Ascher, 130 Mich. 540, 90 N. W. 418 (1902); State v. Barnes, 54 Wash. 493, 103 Pac. 792 (1909).

[35] State v. Hansford, 76 Kan. 678, 92 Pac. 551 (1907); Salistean v. State, 115 Neb. 838, 215 N. W. 107 (1927); State v. Jefferson, 66 N. C. 309 (1872); Upchurch v. State, 36 Tex. Cr. R. 627, 38 S. W. 206 (1896).

[36] See notes 25-27 *supra;* State v. Crocker, 239 N. C. 446, 80 S. E. 2d 243 (1954) ("Nor is there evidence that any of these jurors, when court convened Friday morning, were not 'clothed in their right minds' and able to proceed with their jury service. *The record here shows that the testimony before the trial judge was heard in the absence of the jury.* There is no indication that any of the jurors were questioned in open court or examined by a physician or other person relative

When, after a thorough examination by the trial judge as to the facts and circumstances surrounding the misconduct of the jury, he finds that justice would be better served if the jury were discharged, the general rule is that such a decision will not be disturbed on appeal, and on subsequent retrial, double jeopardy will not attach.[37]

In view of the constitutional and common law prohibitions against double jeopardy, and consistent with the basic theory that such mistrial is to be used only in cases of manifest necessity, it is submitted that the decision in the instant case is sound.[38]

GEORGE M. BRITT

Civil Procedure—Consent Judgments and Settlements—Right of Liability Insurer to Bind Insured

The North Carolina motorist who reads his liability policy carefully will probably notice that it contains a clause substantially as follows:

> The Company shall (a) defend any suit against the insured alleging such injury, sickness, disease, or destruction and seeking damages on account thereof, even if such suit is groundless, false, or fraudulent; *But the Company may make such investigation, negotiation, and settlement of any claim or suit as it deems expedient.*[1] (Italics added.)

The usual policy also includes an express condition precedent to the insurer's obligation to indemnify the insured which requires him to forward immediately to the insurer any process, demand, notice, or pleading served on him because of an accident in which the insured was involved.[2]

to their fitness and competence to serve as jurors when court convened on Friday morning.") [Italics added.]

[37] See notes 18-24 *supra*. In the majority of cases in which a mistrial has been sustained over defendant's objection, the trial judge has personally examined the jurors to determine the necessity for a discharge of the jury.

[38] State v. Crocker, 239 N. C. 446, 453, 80 S. E. 2d 243 (1954). "Our holding here is that the facts and circumstances set forth in the findings of fact are not of such compelling nature as to justify a further relaxation of a rule of such importance in safeguarding the life and liberty of a citizen against repeated prosecutions for the same offense. The preservation of the salutary principle underlying the plea of former jeopardy in capital cases is of far greater importance than the service by this defendant of the prison term imposed by the judgment . . . upon her conviction for manslaughter."

[1] Because of this wording the standard indemnity policy is more than a mere contract of indemnity against actual loss in the sense of money paid. It is a contract of insurance against liability for damages, and the insurer adopts the liability of the insured, within policy coverage. State *ex rel.* Boney v. Central Mutual Ins. Co. of Chicago, 213 N. C. 470, 196 S. E. 837 (1938).

If the plaintiff and the defendant are both insured by the same company, the insureds must engage their own attorneys, and the policies become mere indemnity policies. O'Morrow v. Borad, 27 Cal. 2d 794, 167 P. 2d 483 (1946).

[2] Hendrix v. Employer's Mutual Liability Ins. Co., 102 F. Supp. 31 (E. D. S. C. 1952); Martin v. Traders & General Ins. Co., 258 S. W. 2d 142 (Tex. Civ. App. 1953). See Stephens v. Childers, 236 N. C. 348, 72 S. E. 2d 849 (1952).

These provisions seem reasonable enough, but their combined legal effect can result in harsh injustice to the insured. For example, let us suppose that an insured motorist was involved in an automobile collision caused by the negligence of the other party. The insured's damage was considerable, while the other motorist's injuries to person and property were slight. Before the insured had engaged an attorney to prosecute his claim against the other motorist, he was made defendant in an action by the other party. In order to avail himself of the benefits of his policy, he forwarded the process immediately to his insurer. Pursuant to its contract right to control the defense[3] the insurer employed attorneys to defend the action against the insured. These attorneys settled with the plaintiff and consented to an entry of judgment against the insured which the insurer satisfied. May the insured, who had no knowledge of these proceedings, now sue the negligent party?

Alabama, Massachusetts, Missouri, and Ohio have held that the insured is barred by this consent judgment when he undertakes to sue the other motorist,[4] and New Jersey has held that, even when no con-

[3] U. S. A. C. Transport, Inc. v. Corley, 202 F. 2d 8 (5th Cir. 1953); Traders & General Ins. Co. v. Rudco Oil & Gas Co., 129 F. 2d 621 (10th Cir. 1942); Attleboro Mfg. Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co., 240 Fed. 573 (1st Cir. 1917); Abrams v. Factory Mutual Ins. Co., 298 Mass. 141, 10 N. E. 2d 82 (1937); Long v. Union Indemnity Co., 277 Mass. 428, 178 N. E. 737 (1931); Wynnewood Lumber Co. v. The Travelers Ins. Co., 173 N. C. 269, 91 S. E. 946 (1917).

The right to control carries with it several correlative duties. The insurer is liable to the insured when in bad faith it refuses to defend a claim within policy coverage. Traders & General Ins. Co. v. Rudco Oil & Gas Co., 129 F. 2d 621 (10th Cir. 1942). It is also liable for the negligence of the attorneys engaged to defend the action. Attleboro Mfg. Co. v. Frankfort Marine, Accident, & Plate Glass Ins. Co., 240 Fed. 573 (1st Cir. 1917). The insurer is liable to the insured if its attorneys negligently allow a judgment in excess of policy coverage to be entered against the insured. Abrams v. Factory Mutual Liability Ins. Co., 298 Mass. 141, 10 N. E. 2d 82 (1937). It has been said that the insurer owes a duty to the insured to assert every proper and available defense in his behalf. Jewtraw v. Hartford Accident & Indemnity Co., 280 App. Div. 150, 112 N. Y. S. 2d 727, 730 (3d Dep't 1952). See State Automobile Ins. Co. v. York, 104 F. 2d 730 (4th Cir. 1939), *cert. denied* 308 U. S. 591 (1939).

However, in Wynnewood Lumber Co. v. The Travelers Ins. Co., 173 N. C. 269, 91 S. E. 946 (1917) where the injured party recovered against the insured an amount in excess of the value of the policy, it was held that the insurer was not liable for refusing to settle with the injured party at a figure within policy coverage, such settlement being within the discretion of the insurer, who would be liable only for fraud, negligence, or failure to act in good faith.

[4] A.B.C. Truck Lines, Inc. v. Kenemer, 247 Ala. 543, 25 So. 2d 511 (1946). This case is a good example of how the rule sometimes works injustice. While the insured's action against the owner of the other vehicle was pending in the Alabama trial court, the defendant rushed over to Georgia and served agents of the insured with process. The insured's agents called in the insurer, which defended the action in the Georgia trial court. However, defendant obtained verdict and judgment against the insured. Then the defendant pleaded this Georgia judgmen in bar of insured's suit in Alabama. The plea was allowed, and the insured lost its day in court. Its officers had no knowledge of the Georgia proceedings. The principal factor working against the insured was that the Alabama court could not set aside a Georgia court's judgment unless the judgment was void on its face. Brown, *J.*, dissented vigorously.

sent judgment was entered, a settlement in and of itself is nevertheless a bar to any subsequent action initiated by the insured, arising out of the same transaction.[5] However, both as to settlements and consent judgments, the majority rule is *contra*.[6] Thus, most jurisdictions which have considered the question hold that the attorney hired by the insurer to *defend* the action against the insured has no authority, express or implied, to impair any substantive rights of the insured.[7]

Some of the courts among the majority rely on the limited nature of the authority of the insurer's attorney,[8] while others have held that the insurer's attorney cannot in any way be considered an agent of the in-

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Long v. Union Indemnity Co., 277 Mass. 428, 178 N. E. 737 (1931); Keller v. Keklikian, 362 Mo. 919, 244 S. W. 2d 1001 (1951) (settlement coupled with "dismissal with prejudice"); Ross v. Stricker, 153 Ohio St. 153, 91 N. E. 2d 18 (1950) (verdict rendered against insured, judgment entered on the verdict; insured not allowed to set aside judgment satisfied by the insurer without his consent).

[5] Kelleher v. Lozzi, 7 N. J. 17, 80 A. 2d 196 (1951), *rehearing denied*, May 14, 1951. See Note, 51 COL. L. REV. 1062 (1951).

[6] Settlement by insurer's attorneys no bar: U. S. A. C. Transport Inc. v. Corley, 202 F. 2d 8 (5th Cir. 1953); Fikes v. Johnson, 220 Ark. 448, 248 S. W. 2d 362 (1952); Foremost Dairies, Inc. v. Campbell Coal Co., 57 Ga. App. 540, 196 S. E. 279 (1938); Last v. Brams, 238 Ill. App. 82 (1925); Emery v. Litchard, 137 Misc. 885, 245 N. Y. Supp. 209 (Sup. Ct. 1930); Jetton v. Polk, 17 Tenn. App. 395, 68 S. W. 2d 127 (1933); Owen v. Dixon, 162 Va. 601, 175 S. E. 41 (1934); Paternoster v. Swick, 43 LUZ. L. REG. 119 (Pa., June 5, 1953).

The New Jersey lower courts have twice held that an unauthorized settlement by the insurer's attorneys is no bar to an action by the insured, distinguishing Kelleher v. Lozzi, 7 N. J. 17, 80 A. 2d 196 (1951). Isaacson v. Boswell, 18 N. J. Super. 95, 86 A. 2d 695 (App. Div. 1952); DeCarlucci v. Brasley, 16 N. J. Super. 48, 83 A. 2d 823 (L. 1951).

Burnham v. Williams, 198 Mo. App. 18, 194 S. W. 751 (1917) held that the settlement by the insurer's attorneys did not bar the insured's claim. Keller v. Keklikian, 362 Mo. 919, 244 S. W. 2d 1001 (1951) did not expressly overrule this decision, but involved the question of failure to assert a compulsory counterclaim before the "dismissal with prejudice."

See also American Trust & Banking Co. v. Parsons, 21 Tenn. App. 202, 108 S. W. 2d 187 (1937) (insured never served with process).

Where the insurer's attorneys settled with claimant, and insurer became insolvent before payment, it has been held that the settlement was not binding on the insured, when the claimant undertook to collect from the insured. Countryman v. Breen, 241 App. Div. 392, 271 N. Y. Supp. 744 (4th Dep't 1934); Haluka v. Baker, 66 Ohio App. 308, 34 N. E. 2d 68 (1941). Also, when the insurer's attorneys withdrew from the case because of the insurer's sudden insolvency and what was in effect a judgment by default was entered against insured, this default judgment was vacated. Fessler v. Weiss, 348 Ill. App. 21, 107 N. E. 2d 795 (1952).

[7] Even in the jurisdictions in the minority on this point there is no problem where the policy is a combined collision-liability policy, for the insured then has no substantive rights to be impaired. Upon full payment to the insured of damages suffered by him, the insurer is subrogated, and as the real party in interest may maintain suit against the other motorist. Burgess v. Trevathan, 236 N. C. 157, 72 S. E. 2d 231 (1952); Underwood v. Dooley, 197 N. C. 100, 147 S. E. 686 (1929). Of course, the insured may still lose his cause of action for any damage to person or property not covered by the policy or for which the insurer has not made him whole.

[8] Fikes v. Johnson, 220 Ark. 448, 248 S. W. 2d 362 (1952); Fessler v. Weiss, 348 Ill. App. 21, 107 N. E. 2d 795 (1952); Burnham v. Williams, 198 Mo. App. 18, 194 S. W. 751 (1917); Countryman v. Breen, 241 App. Div. 392, 271 N. Y. Supp. 744 (4th Dep't 1934); Jetton v. Polk, 17 Tenn. App. 395, 68 S. W. 2d 127 (1933); Paternoster v. Swick, 43 LUZ L. REG. 119 (Pa., June 5, 1953).

sured.[9] The courts adopting the limited agency view (*i.e.*, holding that an attorney cannot without express authority bind his client by a settlement or entry of a consent judgment) are supported by the weight of authority.[10] On the other hand, the courts rejecting the agency argument are also supported by authority, for it is a cardinal principle of agency that the principal is allowed some measure of control over his agent,[11] and under the terms of the policy it would seem clear that the insured has no control over the conduct of the litigation.[12] Furthermore, the insurance company is only incidentally acting on behalf of the in-

[9] U. S. A. C. Transport Inc. v. Corley, 202 F. 2d 8 (5th Cir. 1953); Foremost Dairies, Inc. v. Campbell Coal Co., 57 Ga. App. 540, 196 S. E. 279 (1938); Last v. Brams, 238 Ill. App. 82 (1925); Isaacson v. Boswell, 18 N. J. Super. 95, 86 A. 2d 695 (App. Div. 1952); DeCarlucci v. Brasley, 16 N. J. Super. 48, 83 A. 2d 823 (L. 1951); Haluka v. Baker, 66 Ohio App. 308, 34 N. E. 2d 68 (1941). *But cf.* Stephens v. Childers, 236 N. C. 348, 72 S. E. 2d 849 (1952) which holds that the insurer's attorney is the agent of the insured, and that the attorney's negligence is imputable to insured, for the purposes of vacation of judgment on the grounds of excusable neglect. N. C. GEN. STAT. § 1-220 (1953).

In Emery v. Litchard, 137 Misc. 885, 245 N. Y. Supp. 209 (Sup. Ct. 1930) it was said that a settlement was not an admission of liability, since the question of liability of the parties was for the jury to decide.

[10] Crawford v. Tucker, 258 Ala. 658, 64 So. 2d 411 (1952); Fresno City High School Dist. v. Dillon, 34 Cal. App. 2d 636, 94 P. 2d 86 (1939); DeLong v. Owsley's Executrix, 308 Ky. 128, 213 S. W. 2d 806 (1948); Sudekum v. Fasnachts' Estate, 236 Mo. App. 455, 157 S. W. 2d 264 (1942); Town of Bath v. Norman, 226 N. C. 502, 39 S. E. 2d 363 (1940); Smith v. Land and Mineral Co., 217 N. C. 346, 8 S. E. 2d 225 (1940); Morgan v. Hood, 211 N. C. 91, 189 S. E. 115 (1937); Early v. Burns, 142 S. W. 2d 260 (Tex. Civ. App. 1940).

However, it is often said that the attorney is presumed to have authority to bind his client, and the party seeking to avoid the settlement, compromise, judgment or stipulation has the burden of overcoming this presumption. City of Medford v. Corbett, 302 Mass. 573, 20 N. E. 2d 402 (1939); Renken v. Sidebotham, 227 S. W. 2d 99 (Mo. App. 1950); Ledford v. Ledford, 229 N. C. 373, 49 S. E. 2d 794 (1948); Keen v. Parker, 217 N. C. 378, 8 S. E. 2d 209 (1940); Wadden v. Sanger, 250 S. W. 2d 312 (Tex. Civ. App. 1952).

Some courts hold that an attorney has authority to bind his client by a settlement or entry of a consent judgment, implied from the nature of his employment. Ferrara v. Genduso, 214 Ind. 99, 14 N. E. 2d 580 (1938); Bielby v. Allender, 330 Mich. 12, 46 N. W. 2d 445 (1951); Rader v. Campbell, 134 W. Va. 485, 61 S. E. 2d 228 (1949). See Harrington v. Buchanan, 222 N. C. 698, 24 S. E. 2d 534 (1943).

[11] Isaacson v. Boswell, 18 N. J. Super. 95, 86 A. 2d 695 (App. Div. 1952); Haluka v. Baker, 66 Ohio App. 308, 34 N. E. 2d 68 (1941); RESTATEMENT, AGENCY §§ 1(1); 14, *comment b* (1933). See also RESTATEMENT AGENCY §§ 2(3), 385 (1933).

It should be noted here that for the purposes of privileged communications between attorney and client, the insured is considered the client of the insurer's attorney. N. Y. Casualty Co. v. Superior Court In and For the County of San Francisco, 30 Cal. App. 2d 130, 85 P. 2d 965 (1938); State v. Krich, 123 N. J. L. 519, 9 A. 2d 803 (Supt. Ct. 1939); Neugass v. Terminal Cab Corp., 139 Misc. 699, 249 N. Y. Supp. 631 (Sup. Ct. 1931); Westminster Airways, Ltd. v. Kuwait Oil Co. (1951) 1 K. B. 134. But the policy giving rise to the privilege is obviously not incompatible with a holding that an insurer contracting to *defend* an action against the insured may not prejudice his substantive rights; it does not follow that because of the attachment of the attorney-client relationship for purposes of the privilege, the insured stands to lose his cause of action because of the attorney's default.

[12] See note 3 *supra*.

sured, but is furthering its own interests[13] in fulfilling its express contract obligations to the insured.[14]

North Carolina has never decided the question of the authority of the insurer's attorney to bind the insured by a settlement or consent judgment which prejudices the insured's substantive rights. In two cases the question could have been decided, but the counsel for the insured collaterally attacked the consent judgments which had been entered against the insured, and the question was therefore not properly raised.[15] Since there has been no definite holding by the North Carolina Court that the insurer's attorneys are authorized to bargain away the substantive rights of the insured, the way seems clear for a successful attack against the judgment by means of a motion in the cause.[16] Forasmuch

[13] Attleboro Mfg. Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co., 240 Fed. 573 (1st Cir. 1917); Hayes v. Gessner, 315 Mass. 366, 52 N. E. 2d 968 (1944); Long v. Union Indemnity Co., 277 Mass. 428, 178 N. E. 737 (1931).

[14] Goldstein v. Bernstein, 315 Mass. 329, 52 N. E. 2d 559 (1943); Abrams v. Factory Mutual Liability Ins. Co., 298 Mass. 141, 10 N. E. 2d 82 (1937).

[15] LaLonde v. Hubbard, 202 N. C. 771, 164 S. E. 359 (1932); Stone v. Carolina Coach Co., 238 N. C. 662, 78 S. E. 2d 605 (1953). In the first cited case, counsel for the insured took a voluntary nonsuit when the trial judge refused to allow the plaintiff to introduce evidence that the former judgment had been rendered without his consent, and then appealed to the Supreme Court. In the second cited case counsel for the insured filed a reply to defendant's amended answer which set up the consent judgment as a bar to plaintiff's cause of action, the trial judge overruled defendant's demurrer to the reply, but the Supreme Court reversed, on the ground that a consent judgment cannot be collaterally attacked.

It is well settled in this state that a consent judgment entered without authority cannot be collaterally impeached. Coker v. Coker, 224 N. C. 450, 31 S. E. 2d 364 (1944); Gibson v. Gordon, 213 N. C. 666, 197 S. E. 135 (1938); Cason v. Shute, 211 N. C. 195, 189 S. E. 494 (1937); Morris v. Patterson, 180 N. C. 484, 105 S. E. 25 (1920). The proper procedure for setting aside consent judgments is by a motion in the cause. Hall v. Shippers Express, Inc. 234 N. C. 38, 65 S. E. 2d 333 (1951); King v. King, 225 N. C. 639, 35 S. E. 2d 893 (1945); Gibson v. Gordon, 213 N. C. 666, 197 S. E. 135 (1938); Boucher v. Union Trust Co., 211 N. C. 377, 190 S. E. 226 (1937); Dietz v. Bolch, 209 N. C. 202, 183 S. E. 384 (1936); Bizzell v. Auto Tire & Equipment Co., 182 N. C. 98, 108 S. E. 439 (1921). *But see* State *ex rel.* Jones v. Griggs, 223 N. C. 279, 25 S. E. 2d 862 (1943); Morris v. Patterson, 180 N. C. 484, 105 S. E. 25 (1920). See also N. C. GEN. STAT. § 1-207 (1953).

If the consent judgment is attacked in the same county by independent action, the court may treat the action as a motion in the cause, rather than to dismiss. Coker v. Coker, 224 N. C. 450, 31 S. E. 2d 364 (1944).

A judgment which is irregular is also open to attack only by a motion in the cause. Collins v. State Highway Commission, 237 N. C. 277, 74 S. E. 2d 709 (1953); MACINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES § 653 (1929). As regards vacating a judgment because of surprise or excusable neglect under authority of N. C. GEN. STAT. § 1-220 (1953) see Note, 31 N. C. L. REV. 324 (1953), and Moore v. Deal, 239 N. C. 224, 79 S. E. 2d 507 (1954).

When the record shows the judgment to be void, a motion in the cause is not necessary to vacate it. Williams v. Trammel, 230 N. C. 575, 55 S. E. 2d 81 (1949); Powell v. Turpin, 224 N. C. 67, 29 S. E. 2d 26 (1944) (collateral attack allowed); Clark v. Carolina Homes, Inc., 189 N. C. 703, 128 S. E. 20 (1925) (may be quashed *ex mero motu*). And see Ledford v. Ledford, 229 N. C. 373, 376, 49 S. E. 2d 794, 796 (1948), and Town of Bath v. Norman, 226 N. C. 502, 505, 39 S. E. 2d 363, 364 (1946) for dicta that a consent judgment is void if such consent does not exist at the time the court gives the judgment contract its sanction.

[16] The present Chief Justice Barnhill stated in Stone v. Carolina Coach Co., 238 N. C. 662, 665, 78 S. E. 2d 605, 607 (1953) that: "If plaintiff wishes to proceed

as a consent judgment is nothing more than a contract between the parties spread upon the records and given the court's sanction,[17] it would seem that consent by both parties is necessary to make this contract binding,[18] and it is well recognized in this state that insufficient authority in an attorney to consent to judgment is sufficient reason for setting it aside.[19] Furthermore, North Carolina follows the weight of authority in holding that an attorney by reason of his office has no implied authority to compromise away his client's cause of action,[20] or consent to entry of judgment against him.[21]

Yet arguments can be made that the insured should not be allowed to escape the full effect of the settlement or consent judgment. *First,* although by the terms of the policy the insured has no control over the insurer's attorneys and cannot demand that he be notified of the developments in the case, in some situations he will have sufficient notice. If the claimant's complaint is verified, then verification of the answer is mandatory in North Carolina,[22] and since the verification is an affidavit of the party it is to be made by the party himself.[23] If the insured is

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further in this cause, he must first have the Parker judgment vacated by independent action or motion in the cause, as he may be advised. It is not proper for us at this time to express an opinion as to which is the appropriate remedy."

[17] King v. King, 225 N. C. 639, 35 S. E. 2d 893 (1945); State *ex rel.* Jones v. Griggs, 223 N. C. 279, 25 S. E. 2d 862 (1943); Keen v. Parker, 217 N. C. 378, 8 S. E. 2d 209 (1940); Morris v. Patterson, 180 N. C. 484, 105 S. E. 25 (1920); Gardiner v. May, 172 N. C. 192, 89 S. E. 955 (1916).

[18] Pack v. Newman, 232 N. C. 397, 61 S. E. 2d 90 (1950); Ledford v. Ledford, 229 N. C. 373, 49 S. E. 2d 794 (1948); Gibson v. Gordon, 213 N. C. 666, 197 S. E. 135 (1938); Dietz v. Bolch, 209 N. C. 202, 183 S. E. 384 (1936); Bank of Glade Spring v. McEwen, 160 N. C. 414, 76 S. E. 222 (1912).

[19] Town of Bath v. Norman, 226 N. C. 502, 39 S. E. 2d 363 (1946); Morgan v. Hood, 211 N. C. 91, 189 S. E. 115 (1937); Dietz v. Bolch, 209 N. C. 202, 183 S. E. 384 (1936); Peoples Bank of Burnsville v. Penland, 206 N. C. 323, 173 S. E. 345 (1934); Bizzell v. Auto Tire & Equipment Co., 182 N. C. 98, 108 S. E. 439 (1921); Chavis v. Brown, 174 N. C. 122, 93 S. E. 471 (1917); Gardiner v. May, 172 N. C. 192, 89 S. E. 955 (1916); Hoell v. White, 169 N. C. 640, 86 S. E. 569 (1915); Bank of Glade Spring v. McEwen, 160 N. C. 414, 76 S. E. 222 (1912).

Where both parties actually consent to the judgment, it is necessary to obtain the consent of both parties before setting it aside. Ledford v. Ledford, 229 N. C. 373, 49 S. E. 2d 794 (1948); King v. King, 225 N. C. 639, 35 S. E. 2d 893 (1945); Keen v. Parker, 217 N. C. 378, 8 S. E. 2d 209 (1940); Boucher v. Union Trust Co., 211 N. C. 377, 190 S. E. 226 (1937).

There is some language in the reports to the effect that a consent judgment obtained by fraud and mistake, being nothing more than a contract, may be attacked in an independent action. Morris v. Patterson, 180 N. C. 484, 105 S. E. 25 (1920); Gardiner v. May, 172 N. C. 192, 89 S. E. 955 (1916); Bank of Glade Spring v. McEwen, 160 N. C. 414, 76 S. E. 222 (1912).

[20] Town of Bath v. Norman, 226 N. C. 502, 39 S. E. 2d 363 (1946); Bizzell v. Auto Tire & Equipment Co., 182 N. C. 98, 108 S. E. 439 (1921); Chavis v. Brown, 174 N. C. 122, 93 S. E. 471 (1917).

[21] Morgan v. Hood, 211 N. C. 91, 189 S. E. 115 (1937); Bank of Glade Spring v. McEwen, 160 N. C. 414, 76 S. E. 222 (1912).

[22] N. C. GEN. STAT. § 1-144 (1953). But in Stone v. Carolina Coach Co., 238 N. C. 662, 78 S. E. 2d 605 (1953) the complaint in the former action was verified, but the answer filed by the insurer's attorneys was not. Transcript of Record, pp. 12, 15.

[23] McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES § 367

called upon to verify the answer, or any other pleadings, he would have sufficient notice of the progress of the action to be represented by his *own* attorney, who would be charged with prevention of any compromise prejudicial to the insured's interests.[24] Furthermore, most policies of liability insurance contain as an express condition a "cooperation clause"[25] providing that the insured must cooperate in the defense, else the insurer is relieved of liability.[26] If the cause is tried doubtless the insured will cooperate and his presence would give him sufficient opportunity to object to any compromises detrimental to his interests.

Second, one court which has consistently refused relief to the insured in this situation has said that the insured cannot accept on the one hand the benefit of the defense of the action and the satisfaction of the claim against him, and on the other hand contest the insurer's actions which work to his detriment.[27]

Third, an attorney engaged contemporaneously by the insured to assert his claim against the other party within the framework of the action against the insured should certainly keep in contact with the insurer's attorneys to prevent action prejudicial to his client's interests, for such default might be chargeable to the client.[28]

(1929). When the action or defense is founded upon a written instrument for the payment of money and the instrument is in the possession of an agent or attorney, or if all the material allegations of the pleadings to be verified are within the personal knowledge of the agent or attorney, such agent or attorney may make the affidavit. N. C. GEN. STAT. § 1-146 (1953). These two exceptions seem to be inapplicable in an action for damages arising out of a motor vehicle collision.

[24] In La Londe v. Hubbard, 202 N. C. 771, 164 S. E. 359 (1932), the insured defendant had engaged his own attorney. However, the attorney knew nothing of the agreement to enter the consent judgment and therefore he did not sign it. The court held that a consent judgment was not open to attack just because it was not signed by all of the insured's attorneys of record.

If insured's own attorney arranges a dismissal of the action against his client, upon agreement that a settlement will be made out of court, the wording of the stipulation may constitute a *retraxit,* which would operate to bar insured's claim much as would a consent judgment. Steele v. Beaty, 215 N. C. 680, 2 S. E. 2d 854 (1939). This opinion also includes an excellent discussion of types of dismissals, etc., which will and which will not operate as res judicata. *Id.,* at 682-685, 2 S. E. 2d at 855-857 (1939).

[25] These clauses typically state that the insured is to cooperate with the insurer, and upon request of the insurer is to attend hearings and trials, and assist in effecting settlements, giving evidence, obtaining the attendance of witnesses, and so forth.

[26] Shafer v. Utica Mutual Ins. Co., 248 App. Div. 279, 289 N. Y. Supp. 577 (4th Dep't 1936); MacClure v. Accident & Casualty Ins. Co. of Winterthur, Switzerland, 229 N. C. 305, 49 S. E. 2d 742 (1948); Hoffman v. Labutzke, 233 Wis 365, 289 N. W. 652 (1940).

Yet, it is clear that this clause is for the convenience of the insurer, and when the parties reach a compromise agreement early in the case, the clause never comes into play, and the insured has no notice of the developments in the case.

[27] Hayes v. Gessner, 315 Mass. 366, 52 N. E. 2d 968 (1944). See Keller v. Keklikian, 362 Mo. 919, 244 S. W. 2d 1001 (1951).

[28] Among other things, the attorney must know that a counterclaim is in effect compulsory in such actions, and that if a counterclaim is not pleaded his client will be forever barred from recovery. McLean Trucking Co. v. Carolina Scenic Stages, Inc., 95 F. Supp. 437 (M. D. N. C. 1951).

The principle of res judicata was established to prevent needless litigation, and

Fourth, in addition to being an express grant of authority to settle, might not the words "but the Company may make such investigation, negotiation, and settlement of any claim or suit as it deems expedient" be construed as granting authority[29] to consent to entry of judgment against the insured? Massachusetts has so held.[30]

In 1932 the Massachusetts legislature, recognizing the unfairness to the insured resulting from this decision binding him,[31] enacted a statute to the effect that a judgment entered by agreement, secured by bond or liability policy, would not operate as a bar to any subsequent action by the insured or bonded defendant unless such agreement was signed by the defendant in person.[32] Should the need become apparent, the North Carolina General Assembly might enact a comparable measure.

The General Assembly in 1953 adopted the Motor Vehicle Safety Responsibility Act which is in effect in most states and which provides, *inter alia,* that the insurer's liability is to become absolute whenever

bars not only all questions actually litigated, but those which could have been raised as well. Angel v. Bullington, 330 U. S. 183, 186 (1946). This principle bars the parties and their privies as to all questions litigated in one-transaction automobile accident cases. Stone v. Carolina Coach Co., 238 N. C. 662, 78 S. E. 2d 605 (1953) (insured party barred from proceeding against employer of driver who had judgment against insured); Pinnix v. Griffin, 221 N. C. 348, 20 S. E. 2d 366 (1942) (injured party barred from suing employer where he had already obtained a judgment, although inadequate, against employee); Leary v. Virginia-Carolina Joint Stock Land Bank, 215 N. C. 501, 2 S. E. 2d 570 (1939) (plaintiff's agent-driver was adjudged negligent in action against him by bank's driver-employee; judgment against plaintiff's agent-driver estops plaintiff from proceeding against bank).

There are many cases dealing with the doctrine of res judicata as it applies to co-defendants who are also joint tort-feasors. Where *A* obtains verdict and judgment, or settlement, or consent judgment against *B,* and *B* is later sued by *C, A* may successfully plead res judicata when *B* joins *A* as co-defendant for contribution under N. C. GEN. STAT. § 1-240 (1953). Stansel v. McIntyre, 237 N. C. 148, 74 S. E. 2d 345 (1953); Snyder v. Kenan Oil Co., 235 N. C. 119, 68 S. E. 2d 805 (1951); Herring v. Queen City Coach Co., 234 N. C. 51, 65 S. E. 2d 505 (1951); Tarkington v. Rock Hill Printing & Finishing Co., 230 N. C. 354, 53 S. E. 2d 269 (1949).

Where judgment is entered against co-defendant joint tort-feasors, and is satisfied by both, the plea of res judicata is available in subsequent actions between them. Lumberton Coach Co. v. Stone, 235 N. C. 619, 70 S. E. 2d 673 (1952). But where *A* sues *B* and *B* brings cross action against *C* as joint tort-feasor, but *A* does not amend his pleadings to state a cause of action against *C,* the question of *C*'s liability to *A* is not in issue, and *A* may sue *C* in a subsequent action. Powell v. Ingram, 231 N. C. 427, 57 S. E. 2d 315 (1950). As to the necessity for adversary pleadings between all the parties, see Bunge v. Yager, 236 Minn. 245, 52 N. W. 2d 446 (1952).

[29] In Morgan v. Hood, 211 N. C. 91, 189 S. E. 115 (1937) it was held that authority to compromise a case, and to consent to a judgment founded on such compromise, cannot be conferred upon an attorney by an agent who was authorized by his principal to employ an attorney to defend the action. *Accord,* Attleboro Mfg. Co. v. Frankfort Marine, Accident and Plate Glass Ins. Co., 240 Fed. 573 (1st Cir. 1917). *But cf.* A. B. C. Truck Lines Inc. v. Kenemer, 247 Ala. 543, 25 So. 2d 511 (1946); Petition of Preferred Accident Ins. Co. of N. Y., 273 App. Div. 993, 78 N. Y. S. 2d 674 (1st Dep't 1948).

[30] Long v. Union Indemnity Co., 277 Mass. 428, 178 N. E. 737 (1931) (entry of consent judgment was an appropriate method of settlement).

[31] Note 30 *supra.*

[32] MASS. ANN. LAWS c. 231, § 140(A) (1933).

injury occurs, and that no violation of the policy shall defeat or void it.[33] This statutory provision would seem to be an unequivocal expression of public policy for the protection of injured parties[34] within policy coverage by making certain that the insurance company cannot avoid payment because of a breach by the insured of some of the policy conditions.[35] This provision, however, does not relieve the insured of any of the pressure which forces him to forward summons and other process immediately to the insurer. For, he would still be liable to the insurer for failure to fulfill his contract obligations if he allowed an unreasonable time to elapse in order to engage a personal attorney before forwarding the process.[36]

R. G. HALL, JR.

Income Tax—Deductibility of Attorney's Fees for Tax Purposes

The deductibility of legal fees for income tax purposes is an important factor to be considered by lawyers and laymen alike. If a client is in the fifty per cent income tax bracket, the Federal Government will, in effect, pay one half of any fee deducted by the client. This may well be an influencing factor in determining the overall financial consequences of employing legal counsel.

In order to be deductible, the fee must fall into the category of business or non-business expenses as set out in the Internal Revenue Code. If the fee covers both deductible and non-deductible items, it should be allocated between the two, and failure to so allocate may result in the disallowance of the entire amount.[1] The provision for business expenses requires that an expense, to be deductible, must be both ordinary and necessary, and incurred in carrying on a trade or business.[2] The pro-

[33] N. C. GEN. STAT. § 20-279(f) (1953).

[34] Courts of other states have construed this provision as an absolute protection of injured third parties. Century Indemnity Co. v. Simon, 77 F. Supp. 221 (D. C. N. J. 1948); Farm Bureau Automobile Ins. Co. v. Martin, 97 N. H. 196, 84 A. 2d 823 (1951); Atlantic Casualty Co. v. Bingham, 10 N. J. 460, 92 A. 2d 1 (1952), affirming 18 N. J. Super. 170, 86 A. 2d 792 (App. Div. 1952); Stonborough v. Preferred Accident Ins. Co. of New York, 292 N. Y. 154, 54 N. E. 2d 342 (1944), affirming 266 App. Div. 838, 43 N. Y. S. 2d 512 (1st Dep't 1944), affirming 180 Misc. 339, 40 N. Y. S. 2d 480 (Sup. Ct. 1943).

[35] Such as breach of the "cooperation clause," or failure to forward immediately all summons and process received.

[36] Where the insurer is absolutely liable to make the injured party whole, because of a statute such as N. C. GEN. STAT. § 20-279(f) (1953), a cause of action accrues against the insured when he fails to fulfill the policy conditions to the prejudice of the insurer. Illinois Casualty Co. v. Krol, 324 Ill. App. 478, 58 N. E. 2d 473 (1944); Service Mutual Liability Ins. Co. v. Aronofsky, 308 Mass. 249, 31 N. E. 2d 837 (1941); American Fidelity & Casualty Co. v. Big Four Taxi Co., 111 W. Va. 462, 163 S. E. 40 (1932).

[1] Jordan v. Commissioner, 12 B. T. A. 423 (1928).

[2] INT. REV. CODE § 23(a)(1)(A) provides for the deduction of "all ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. . . ."

vision for non-business expenses allows deduction of those which are ordinary and necessary, and incurred in the production or collection of income or for the management, conservation, or maintenance of income producing property.[3] These sections must be construed *in pari materia,*[4] and any deduction under the non-business provision is subject, except for the requirement of being incurred in connection with a trade or business, to all the limitations that apply to the business expense category.[5]

Whether the expense involved meets the "ordinary and necessary" requirements in relation to a proper business or non-business activity is a question of fact to be determined as such.[6] The test the courts apply in making this determination is *what is normal or usual—ordinary and necessary according to the ways of conduct and the forms of speech prevailing in the business world.*[7] Such expenses need not relate directly to the production of income; it being enough if such expense is directly connected with or proximately results from the conduct of the business.[8]

The question whether to apply the "ordinary and necessary" test to the circumstances then prevailing or to the events causing those circumstances posed a difficult problem. For example, a 1928 case said[9] ". . . a suit ordinarily, and as a general thing at least, necessarily requires the employment of counsel . . .", thereby applying the test to the prevailing circumstances. Later cases[10] have reasoned that it is never necessary to violate the law in managing a business, and have applied the test to the events causing those circumstances. This question was settled in *Commissioner v. Heininger,*[11] the Supreme Court holding that the circumstances then prevailing were controlling.

Prior to the *Bingham Trust*[12] case, legal expenses incurred in income tax litigation were consistently denied.[13] However, legal fees incurred in determining liability on income tax are now uniformly allowed on

[3] INT. REV. CODE § 23(a)(2) provides that "in the case of an individual all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income" are deductible.

[4] Bingham v. Commissioner, 325 U. S. 365 (1945).

[5] McDonald v. Commissioner, 323 U. S. 57 (1944).

[6] Bingham v. Commissioner, 325 U. S. 365 (1945).

[7] "The standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle." Welch v. Helvering, 290 U. S. 111 (1933).

[8] Bingham v. Commissioner, 325 U. S. 365 (1945); Kornhauser v. United States, 276 U. S. 145 (1928); U. S. Treas. Reg. 118, § 39.23(a)-15 (1953).

[9] Kornhauser v. United States, 276 U. S. 145 (1928).

[10] Deputy, Administratrix, *et al.* v. du Pont, 308 U. S. 488 (1940); Outdoor Advertising Bureau, Inc. v. Commissioner, 89 F. 2d 878 (2d Cir. 1937); Burroughs Building Material Co. v. Commissioner, 47 F. 2d 178 (2d Cir. 1931).

[11] Commissioner v. Heininger, 320 U. S. 467 (1943).

[12] Bingham v. Commissioner, 325 U. S. 365 (1945).

[13] Higgins v. Commissioner, 2 T. C. 948, *aff'd,* 143 F. 2d 654 (1st Cir. 1944); Coffey v. Commissioner, 1 T. C. 579, *aff'd,* 141 F. 2d 204 (5th Cir. 1944); Hord v. Commissioner, P-H 1945 TC MEM. DEC. ¶ 43,283 (1943).

the ground that the expense always concerns taxable income. These deductible fees may cover preparation of returns, filing refund claims, or litigation of tax deficiencies.[14] Such deduction is allowed despite the imposition of penalties for civil fraud.[15]

Legal fees incurred in contesting gift tax deficiencies are not deductible for the reason that neither the gifts nor the expenses were made for the production or collection of income.[16] Likewise, where an heir incurred legal expenses in obtaining a refund of federal estate taxes, the deduction of such expense was refused because the action was to obtain money due as the result of an inheritance, not taxable income. However, that portion of the attorney's fees allocable to interest involved was deductible.[17]

Other cases have allowed deduction of attorney's fees incurred in reorganization of the taxpayer's estate;[18] dissolution and liquidation of a corporation;[19] seeking to prevent conviction of a lawyer on a charge of obstructing justice;[20] creation of an employee pension plan and advice relating to financial operations;[21] determining the right of a minor actor to his earnings;[22] obtaining reinstatement as co-executor of deceased husband's estate;[23] defending position as a corporate officer and director;[24] defending against a suit for fraud;[25] ascertaining rights under an employment contract;[26] and answering questions by a movie script writer before a Congressional committee investigating communistic infiltration into the movie industry and his business.[27]

Where a legal expense is incurred in a business transaction, produc-

[14] U. S. Treas. Reg. 118, § 39.23(a)-15 (1953); Bingham v. Commissioner, 325 U. S. 365 (1945); Armour v. Commissioner, 6 T. C. 359 (1946); Connelly v. Commissioner, 6 T. C. 744 (1946); Greene Motor Co. v. Commissioner, 5 T. C. 314 (1945).

[15] Goodman v. Commissioner, 9 T. C. M. 789, *aff'd*, 200 F. 2d 681 (2d Cir. 1953).

[16] Lykes v. United States, 343 U. S. 118 (1952); Cobb v. Commissioner, 173 F. 2d 711 (6th Cir. 1949).

[17] Edmunds v. United States, 71 F. Supp. 29 (E. D. Mo. 1947).

[18] Bagley v. Commissioner, 8 T. C. 130 (1947), involved fees for advice to the taxpayer concerning the purchase of bonds, loans to corporate officers for the purpose of protecting taxpayer's investment in the corporation, and the merits and legal aspects of a plan submitted to taxpayer by a firm of estate planners for the rearrangement and reinvestment of the taxpayer's entire estate.

[19] United States v. Arcade Co. *et al.*, 203 F. 2d 230 (6th Cir. 1953). Where there is a partial liquidation in connection with a reorganization, the liquidation and reorganization will be looked at as one transaction and all the expenses incurred will be grouped as a capital expenditure. Mills Estate, Inc. v. Commissioner, 206 F. 2d 244 (2d Cir. 1953).

[20] Kaufman v. Commissioner, 12 T. C. 1114 (1949).

[21] Meldrum & Fewsmith, Inc. v. Commissioner, 20 T. C. No. 113 (1953).

[22] Commissioner v. Estate of Bartholomew, 4 T. C. 349, *aff'd per curiam*, 151 F. 2d 534 (9th Cir. 1945).

[23] Crawford v. Commissioner, 5 T. C. 91 (1945).

[24] Hochschild v. Commissioner, 161 F. 2d 817 (2d Cir. 1947).

[25] Peoples-Pittsburgh Trust Co., *et al.* v. Commissioner, 21 B. T. A. 588 (1930).

[26] Blum v. Commissioner, 11 T. C. 101, *aff'd*, 183 F. 2d 281 (3d Cir. 1950).

[27] Salt v. Commissioner, 18 T. C. 182 (1952).

tion or collection of income, or management, conservation, or maintenance of property held for the production of income, it is deductible unless it is (a) personal,[28] (b) capital,[29] or (c) contrary to public policy.[30]

Legal expenses incurred in isolated personal transactions having nothing to do with the taxpayer's business or non-business activities are generally disallowed. Examples of such personal transactions involving legal expenses are those incurred in defending against a suit by a former wife to enforce a property settlement agreement growing out of a divorce;[31] preparing[32] or contesting[33] a will; settling a judgment resulting from an automobile accident[34] (unless such accident occurred with a vehicle being used in a business activity); contesting a disputed election to establish the right to a public office;[35] obtaining a release from military service;[36] prosecuting a suit for slander;[37] and contesting a suit for breach of promise.[38]

Legal fees expended in connection with divorce and separate maintenance are generally non-deductible personal and family expenses. However, that portion of the fee which is properly attributable to the production or collection of amounts includible in gross income as alimony payments under Internal Revenue Code § 22(k) is deductible as a non-business expense.[39] In *Baer v. Commissioner*[40] it was held that the part of an attorney's fee which could be allocated to the services rendered in connection with financial matters in controversy, as distinguished from the divorce controversy, were deductible. Such services were held to be directly related to the conservation and maintenance of property held by the taxpayer for the production of income.

[28] INT. REV. CODE § 24(a)(1).
[29] U. S. Treas. Reg. 118, § 39.24(a)-2 (1953).
[30] Stralla v. Commissioner, 9 T. C. 801 (1947).
[31] Jergens v. Commissioner, 17 T. C. 806 (1951); Howard v. Commissioner, 16 T. C. 157 (1951).
[32] Pennell v. Commissioner, 4 B. T. A. 1039 (1926).
[33] Hutchings v. Burnet, 58 F. 2d 514 (D. C. Cir. 1932).
[34] Dickason v. Commissioner, 20 B. T. A. 496 (1930).
[35] REV. RUL. 1, I. B. R. 1951-1.
[36] Seese v. Commissioner, 7 T. C. 925 (1946).
[37] Legal fees are not deductible even though taxpayer's duties brought him into contact with customers and the slander would affect his business. Lloyd v. Commissioner, 55 F. 2d 842 (7th Cir. 1932); Kleinschmidt v. Commissioner, 12 T. C. 921 (1949).
[38] U. S. Treas. Reg. 118, § 39.24(a)-1 (1953).
[39] Commissioner v. Gale, 191 F. 2d 79 (2d Cir. 1951), *affirming* 13 T. C. 661; LeMonde v. Commissioner, 13 T. C. 670 (1949); U. S. Treas. Reg. 118, § 39.24(a)-1 (1953).
[40] 196 F. 2d 646 (8th Cir. 1952). The basis for this decision seemed to be that stock held by the taxpayer for production of income would have to be sold unless some satisfactory settlement could be worked out. This settlement was accomplished by the lawyer. It has also been held that the fact that the taxpayer will have to sell property held for the production of income will not allow deduction of such attorney's fees. Hexter v. Commissioner, P-H 1945 TC MEM. DEC. ¶ 44,399 (1944).

A ground frequently used for disallowance of a deduction for legal expenses is that the charge is a capital one and should be added to the tax base of property or should be amortized. Fees expended in defending or perfecting title to property are capital in their nature and must be added to the tax basis of the property.[41] For example, a suit to quiet title comes under this rule. Similarly, fees incurred as a result of a lessee's contesting forfeiture of his lease are to clear the title and are consequently capital.[42] Fees in connection with foreclosing a lien follow the same rule.[43] Where title is in dispute and taxpayer pays a claim solely to avoid unfavorable publicity, the legal fees incurred are deductible,[44] but if there is any doubt, the general rule as to title defense will apply.[45] If the action to obtain the property in question is unsuccessful, the fee incurred is a non-deductible personal expense.[46]

Where the title to property is in litigation along with income from it, that part of the expenses allocable to such income is deductible while the remainder is a capital expense.[47] Similarly, the court in *Helvering v. Stormfeltz*[48] permitted a deduction of that part of a fee allocable to the interest in an action to recover a money judgment from a guardian for guardianship funds wrongfully appropriated. The remainder was a capital expenditure analogous to that in title defense litigation. Several other cases[49] appear to be *contra* in that they have applied a major object rule—that is where title was the major object of the litigation and the income merely secondary, then the entire fee is held to be a capital expense. In an action for income from a trust, as distinguished from title to the trust property, deduction was allowed.[50]

Attorney's fees incurred in connection with incorporation are capital in nature and can be treated as a loss on dissolution of the corporation,[51] but where the corporation is chartered for a stipulated length of time, such legal expenses may be amortized over the period the charter is to run.[52] Expenses in connection with mergers, reorganizations and re-

[41] U. S. Treas. Reg. 118, § 39.24(a)-15 (1953).
[42] Johnson v. Commissioner, 162 F. 2d 844 (5th Cir. 1947).
[43] Shaw-Hayden Building Company v. Commissioner, 18 B. T. A. 949 (1930).
[44] Levitt & Sons, Inc. v. Nunan, 142 F. 2d 795 (2d Cir. 1944).
[45] Levitt & Sons, Inc. v. Commissioner, 160 F. 2d 209 (2d Cir. 1947).
[46] McClees v. Commissioner, P-H 1945 TC MEM. DEC. ¶ 45,019 (1945).
[47] Hochschild v. Commissioner, 7 T. C. 81, *rev'd on other grounds*, 161 F. 2d 817 (2d Cir. 1947); U. S. Treas. Reg. 118, § 39.23(a)-15 (1953).
[48] Helvering v. Stormfeltz, 142 F. 2d 982 (8th Cir. 1944). A similar rule was applied in Vincent v. Commissioner, 18 T. C. 339 (1952).
[49] Safety Tube Corp. v. Commissioner, 168 F. 2d 787 (6th Cir. 1948). If the property belongs to the plaintiff, then so does the income, and the title to both is the object of the suit. Midco Oil Co. v. Commissioner, 20 T. C. No. 79 (1953).
[50] Tyler v. Commissioner, 6 T. C. 135 (1949).
[51] U. S. Treas. Reg. 118, § 39.24(a)-2 (1953); Shellabarger Grain Products Co. v. Commissioner, 2 T. C. 75 (1943).
[52] Hershey Mfg. Co. v. Commissioner, 43 F. 2d 298 (10th Cir. 1930).

capitalizations are likewise capital expenditures,[53] but if the merger plans are abandoned, the legal fees incurred may be deducted in the year of abandonment.[54]

Expenses incurred in issuing bonds are capital, representing part of the cost of borrowing money, and are deductible pro-rata over the life of the bonds.[55] The same rule is applicable to expenses incurred in securing mortgages and other loans.[56] Examples of other legal fees which have been held to be capital expenses include those incurred in defending the title to a patent[57] or copyright;[58] defending the title to stock held for the production of income;[59] obtaining a long term lease;[60] in connection with the construction of a building;[61] in the purchase by a corporation of its own stock;[62] and in obtaining an abstract of, or a legal opinion concerning title to real property.[63]

It should be noted that legal fees which are considered capital are not necessarily lost as far as deductions for tax purposes are concerned, but may be merely delayed deductions which can be taken later in the form of deductions for depreciation, amortized expenses, or capital losses when the capital asset is sold.

Prior to the *Heininger* case, all legal fees incurred in connection with defending against a criminal charge on which the taxpayer was found guilty were disallowed on grounds of public policy.[64] Likewise, all such expenses incurred in defending against an action for civil fraud were denied deductibility.[65] Since the *Heininger* decision, however, such deduction is not disallowed solely on the ground that it was contrary to public policy where the taxpayer was found guilty, if a defense was made in good faith.[66] Two recent decisions have indicated that legal expenses incurred because of a wrongful act committed in a non-business activity would also be deductible if such expenses were necessary to the produc-

[53] Skenandoa Rayon Corp. v. Commissioner, 122 F. 2d 268 (2d Cir. 1941).
[54] Sibley, Lindsay & Curr Co. v. Commissioner, 15 T. C. 106 (1950).
[55] Baltimore and Ohio R. R. v. Commissioner, 30 B. T. A. 194 (1934); W. P. Brown & Sons Lumber Co. v. Commissioner 26 B. T. A. 1192 (1932).
[56] Lovejoy v. Commissioner, 18 B. T. A. 1179 (1930).
[57] Urquhart v. Commissioner, 20 T. C. No. 133 (1953).
[58] U. S. Treas. Reg. 118, § 39.24(a)-2 (1953).
[59] Bowers v. Lumpkin, 140 F. 2d 927 (4th Cir. 1944).
[60] Executor of Estate of Hilton v. Commissioner, 27 B. T. A. 57 (1932); Davidson v. Commissioner, 27 B. T. A. 158 (1932).
[61] Equitable Life Assurance Society of U. S. v. Commissioner, 44 B. T. A. 293, *aff'd*, 137 F. 2d 293 (2d Cir. 1943).
[62] Davenport v. Commissioner, P-H 1950 TC MEM. DEC. ¶ 50,035 (1950).
[63] Thompson v. Commissioner, 9 B. T. A. 1342 (1928).
[64] Superior Wines and Liquors, Inc. v. Commissioner, 134 F. 2d 373 (8th Cir. 1943).
[65] Standard Oil Co. v. Commissioner, 129 F. 2d 363 (7th Cir. 1942).
[66] G. C. M. 24,377, 1944 CUM. BUL. 93, allowed deduction of fees incurred in a defense against a charge of violation of the Sherman Anti-Trust Act. G. C. M. 24,810, 1946-1 CUM. BUL. 55, allowed deduction of fees incurred in connection with defending against a suit brought by the Price Administrator for violation of the Emergency Price Control Act.

tion of income or the management, conservation or maintenance of income producing property.[67] Later decisions have indicated that the expenses of defending a business which is *per se* illegal, as distinguished from a legal business operated in an illegal manner, are not deductible, and any holding to the contrary would frustrate public policy.[68]

LEWIS F. CAMP, JR.

Mortgages—Agency—Power of Dealer to Bind Owner by Mortgage—Indicia of Ownership—Automobile Title Certificates

There has been a practice among used-car dealers in purchasing automobiles to receive title certificates with the assignment form on the reverse side merely signed by the assignor-seller but blank as to the assignee-car dealer. Later when the automobile is resold, the new owner's name is entered in the blank as assignee; and there is an anonymous notarization of the original seller's signature. Thus, the transaction is represented as one solely between the original seller and the new owner, concealing the intermediate ownership of the used-car dealer in direct contravention of the North Carolina Motor Vehicle Registration Act.[1]

Since a sale of personal property is not required to be evidenced by any written instrument in order to be valid, it has been held in North Carolina that there may be a transfer of title to an automobile without complying with the registration statute which requires a transfer and delivery of a certificate of title.[2] Therefore, it seems that a buyer may get good title from a dealer who is an actual owner whether he holds an incomplete title certificate or no certificate at all. The aforementioned practice of receiving blank title certificates may, however, mislead third parties where a dealer is not the actual owner but a limited agent.

Such was the situation in *Hawkins v. M & J Finance Corp.*[3] In this case the plaintiff, owner of an automobile, delivered his car and title certificate, with the assignment form on the reverse side blank as to the

[67] Commissioner v. Josephs, 168 F. 2d 233 (8th Cir. 1948); Commissioner v. Heide, 165 F. 2d 699 (2d Cir. 1948). These cases held that a casual trustee could not deduct the expenses incurred in defending against a charge of breach of duty as a trustee. It would be difficult to reconcile these cases with Bingham v. Commissioner, 325 U. S. 365 (1945).

[68] Thomas v. Commissioner, 18 T. C. 1417 (1951); Stralla v. Commissioner, 9 T. C. 801 (1947).

[1] N. C. GEN. STAT. §§ 20-72 *et seq.* (1953).

[2] Carolina Discount Corp. v. Landis Motor Co., 190 N. C. 157, 129 S. E. 414 (1925). In this case *P* had an unrecorded conditional sale on an automobile which *X* sold "free of encumbrance" to *D*. *X* violated the Motor Vehicle Registration Act by not endorsing and delivering the title certificate to *D*. The title certificate showed the outstanding conditional sale. *P* claimed that title could not pass to *D* without a compliance with the statute. *Held:* title passed to *D*. *P* should have recorded his conditional sale in order to put *D* on notice of the encumbrance.

[3] 238 N. C. 174, 77 S. E. 2d 669 (1953).

assignee but signed by the assignor-owner, to a used-car dealer for resale. Instead the dealer exceeded his actual authority to sell and mortgaged the car to the defendant finance company, which loaned money on the car relying on the trade practice among car dealers as showing that title had been transferred to the dealer by the transfer of the certificate signed in blank. The owner was allowed to recover his car from the mortgagee, the court holding that: (1) the dealer authorized merely to sell had no implied authority to mortgage the car; and (2) the defendant-mortgagee could not rely on this trade practice and the blank title certificate as indicating ownership in the dealer so as to estop the real owner from claiming his title. On this latter point the court said:

> These practices may not be used as a basis for invoking the doctrine of estoppel. To permit such would be to legalize by indirection this practice of suppressing notice of intermediate dealer ownership as well as the companion practice of anonymous notarization of transfer certificates, and thereby override the salutary procedure fixed by statute for the prevention and suppression of the very type of fraud and chicanery with which we are at grips in the instant case. The public policy of this State as fixed by these statutes may not be put to naught in such manner. The principles of equity will not permit.[4]

When there is a sale or mortgage by a person not the owner, as in the *Hawkins* case, the rights of the owner as against the buyer or mortgagee may depend on: (1) whether the person selling or mortgaging is an agent of the owner;[5] or (2) whether such person may legally be treated as an owner.[6]

In dealing with the person as an agent, one may rely on the implied or apparent authority of the agent, *i.e.,* that which the principal holds his agent out to the world as having. It is elemental that no authority to sell should be inferred from the *mere* possession of goods.[7] Where,

[4] *Id.* at 184, 77 S. E. 2d at 677.

[5] Carter v. Rowley, 59 Cal. App. 486, 211 Pac. 267 (1922); Spooner v. Cummings, 151 Mass. 313, 23 N. E. 839 (1890); Stockyards Nat. Bank of South Omaha v. Harris Wool Co., 316 Mo. 426, 289 S. W. 623 (1926); Atlantic Discount Corp. v. Young, 224 N. C. 89, 29 S. E. 2d 29 (1944); Southern Ry. v. W. A. Simpkins Co., 178 N. C. 273, 100 S. E. 418 (1919); Mahar v. White, 190 Okla. 434, 124 P. 2d 260 (1942); Brown Bros. & Co. v. The William Clark Co., 22 R. I. 36, 46 Atl. 239 (1900); Zerr v. Howell, 84 S. W. 2d 867 (Tex. Civ. App. 1935); Rogers v. Whitney, 91 Vt. 79, 99 Atl. 419 (1916).

[6] Rapp v. Fred W. Hauger Motors Co., 77 Cal. App. 417, 246 Pac. 1067 (1926); Bailey v. Hoover, 233 Ky. 681, 26 S. W. 2d 522 (1930); Ruddy v. Oregon Auto. Credit Corp., 179 Ore. 688, 174 P. 2d 603 (1946); Commercial Finance Corp. v. Burke, 173 Ore. 341, 145 P. 2d 473 (1944); Scruggs v. Crockett Auto. Co., 41 S. W. 2d 509 (Tex. Civ. App. 1931); Boice v. Finance Corp., 127 Va. 563, 102 S. E. 591 (1920).

[7] Pacific Accept. Corp. v. Bank of Italy, 59 Cal. App. 76, 209 Pac. 1024 (1922);

however, in addition to possession by a limited agent, the owner has given such evidence of authority to sell as usually accompanies such authority according to the custom of trade, this is evidence, not that he is the owner, but that he has received authority from the owner to sell.[8] Illustrative of this latter situation is *Carter v. Rowley*,[9] where an owner left his automobile with a dealer to "find" a purchaser. Instead the dealer sold to an innocent purchaser. There was evidence that: (1) the owner had left his car in the possession of a dealer in secondhand cars; (2) the dealer's premises were surrounded with conspicuous signs advertising used-cars for sale; and (3) the owner knew the dealer's line of business. The court held that such circumstances, in addition to possession, according to the custom of trade and general understanding of businessmen indicated an authority in the dealer to consummate a sale.

Once an authority to sell is established there arises the question what other incidental authority exists by implication. Generally, the authority to sell confers authority to fix any terms and conditions necessary to the sale;[10] but it does not ordinarily include the power to sell on credit,[11] to exchange or barter,[12] or to pledge or mortgage.[13] Consequently, in situations such as that in the *Hawkins* case, courts seem reluctant to extend protection, solely on the basis of an implied agency, to the mortgagee of a dealer with authority limited to selling.[14]

Where a real owner has clothed an agent with indicia of title and such title is relied on by an innocent purchaser, the purchaser may prevail, not on the basis of the agent's apparent authority to represent any-

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Overland Texarkana Co. v. Bickley, 152 La. 622, 94 So. 138 (1922); Hawkins v. M & J Finance Corp., 238 N. C. 174, 178, 77 S. E. 2d 669, 672 (1953); Handley Motor Co., Inc. v. Wood, 237 N. C. 318, 323, 75 S. E. 2d 312, 316 (1953); American Exchange Nat. Bank v. Winder, 198 N. C. 18, 21, 150 S. E. 489, 491 (1929); Hedges v. Burke, 147 Tenn. 247, 247 S. W. 91 (1923).

[8] Carter v. Rowley, 59 Cal. App. 486, 211 Pac. 267 (1922); Atlantic Discount Corp. v. Young, 224 N. C. 89, 29 S. E. 2d 29 (1944); Mahar v. White, 190 Okla. 434, 124 P. 2d 260 (1942).

[9] 59 Cal. App. 486, 211 Pac. 267 (1922).

[10] Powell v. King Lumber Co., 168 N. C. 632, 84 S. E. 1032 (1915); Daniel v. Atlantic Coast Line Railroad, 136 N. C. 517, 48 S. E. 816 (1904); TIFFANY, AGENCY § 32 (2nd ed. 1924).

[11] Bowles v. Rice, 107 Va. 51, 57 S. E. 575 (1907); RESTATEMENT, AGENCY § 65 (1934).

[12] Davison v. Parks, 79 N. H. 262, 108 Atl. 288 (1919); MECHEM OUTLINES OF AGENCY §§ 262-267 (3rd ed. 1923).

[13] Pacific Finance Corp. v. Hendley, 119 Cal. App. 697, 7 P. 2d 391 (1932); Moberg v. Commercial Credit Corp., 230 Minn. 469, 42 N. W. 2d 54 (1950); 2 WILLISTON, SALES §317 (Rev. ed. 1948).

[14] Coolbaugh v. Atlantic Motor Finance Co., 101 N. J. L. 215, 128 Atl. 595 (1925); National Guarantee & Finance Co. v. Pfaff Motor Co., 124 Ohio 34, 176 N. E. 678 (1931). *But cf.* Bauer v. Commercial Credit Co., 163 Wash. 210, 300 Pac. 1049 (1931), where estoppel was applicable and a mortgagee prevailed against an owner. 45 HARV. L. REV. 375 (1931).

one, but on his apparent ownership.[15] In this situation the real owner by his misleading actions is estopped to claim his title. That the real owner thus clothes the agent means that the indicia of title must emanate from the owner with his consent or knowledge as distinguished from indicia feloniously created or obtained, as by forgery.[16] The real owner may be estopped to claim his title where he entrusts possession plus a certain document—automobile title certificate[17] or bill of sale.[18]

Where an automobile title certificate is relied on as an indicium of ownership, according to the *Hawkins* decision, it must be full and complete on its face when received by a third party. North Carolina seems to be in accord with the weight of authority which holds that an incomplete title certificate is not only insufficient indicium of ownership, but is constructive notice of want of title.[19] But where a dealer is entrusted with possession of an owner's automobile and certificate of title with the assignment form on the reverse side blank as to the assignee but signed by the assignor-owner, and the dealer completes the instrument so there are no patent defects, it has been held that a third party may rely on the certificate as indicium of title and treat the dealer as an owner.[20]

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[15] Boice v. Finance & Guaranty Corp., 127 Va. 563, 102 S. E. 591 (1920). See also, San Joaquin Valley Securities Co. v. Harris, 123 Cal. App. 774, 11 P. 2d 49 (1932), illustrating that as indicia of ownership must be coupled with possession, so must possession be coupled with such indicia.

[16] Royle v. Worcester Buick Co., 243 Mass. 143, 137 N. E. 531 (1922). Where the wrongdoer obtains the possession of the certificates of title, ownership, or registration, not by the voluntary act, or with the acquiescence or knowledge of the owner, but by theft or forgery, considerations requiring the invocation of the doctrine of estoppel against the owner are lacking, since the evidences of ownership having been secured by the felonious acts of the wrongdoer, the owner has done nothing to mislead third persons purchasing the property from the wrongdoer on the assumption of his ownership thereof.

[17] Washington Lumber & Millwork Co. v. McGuire, 213 Cal. 13, 1 P. 2d 437 (1931).

[18] Bailey v. Hoover, 233 Ky. 681, 26 S. W. 2d 522 (1930).

[19] A. C. Nelson Auto Sales, Inc. v. Turner, 241 Iowa 927, 44 N. W. 2d 36 (1950); Moberg v. Commercial Credit Corp., 230 Minn. 469, 42 N. W. 2d 54 (1950); Pearl v. Interstate Securities Co., 357 Mo. 160, 206 S. W. 2d 975 (1947); Erwin v. Southwestern Investment Co., 147 Tex. 260, 215 S. W. 2d 330 (1948). See, Wilson v. Commercial Finance Co., 239 N. C. 349, 358, 359, 71 S. E. 2d 908, 915, 916 (1954), where the court stated that under the law of Virginia an automobile registration card would not constitute an indicium of title because the sole evidence of the ownership of a motor vehicle is the certificate of title. The court also said that ignoring the law of Virginia, in this case, the registration card would not be an indicium of title since the notice of transfer form on the reverse side of the card was blank and unsigned.

[20] Commercial Finance Corp. v. Burke, 173 Ore. 341, 145 P. 2d 473 (1944).

Motor Vehicles—Nolo Contendere—Suspension of Driver's License Based Solely on the Record of Sentence on Such Plea Held Invalid

The question whether the record of a plea of *nolo contendere*[1] entered in a drunken driving case will support a suspension of the operator's license by the Commissioner of Motor Vehicles pursuant to provisions of G. S. 20-16[2] was recently presented to the Supreme Court for the first time. In holding the Commissioner's action, taken solely upon the record of the licensee's plea of *nolo contendere,* to be without authority of law, the Court said that, the suspension proceedings before the Commissioner being separate from the proceedings in which the plea was entered, the record was neither sufficient evidence of the offense nor the equivalent of an admission that an offense had been committed.[3]

The plea of *nolo contendere* is of ancient origin[4] and has been recognized by our Supreme Court since 1837.[5] It authorizes judgment as upon a verdict or plea of guilty,[6] but leaves the defendant free to assert his innocence in all other proceedings, both civil[7] and criminal,[8] the judgment and sentence upon the plea not being the equivalent of conviction or confession in open court.[9] Other jurisdictions, confronted with analogous situations, have relaxed this strict rule[10] and have drawn two distinctions not expressly considered by the North Carolina Court: (1) The issue involved in a proceeding of this nature is not the guilt or innocence of the licensee *but rather whether or not he has been con-*

[1] Lat. I do not wish to contest (the action). 2 BOUVIER'S LAW DICTIONARY 2354 (1914). For an excellent survey of the topic, see 30 N. C. L. REV. 407 (1952).

[2] The statute gives the Commissioner "authority to suspend the license of any operator . . . upon a showing by its records or other satisfactory evidence that the licensee . . . has committed an offense for which mandatory revocation of license is required upon conviction." N. C. GEN. STAT. § 20-16 (1953). Driving under the influence of intoxicating liquor is such an offense.

[3] Winesett v. Scheidt, 239 N. C. 190, 79 S. E. 2d 501 (1954).

[4] LAMBARD, EIRENARCHA: OR OF *The Office of the Justices of the Peace* 511 (4th rev. 1599). This manual cites entries, relative to the plea, entered in 1407 and 1409.

[5] The earliest reported case appears to be State v. Oxendine, 19 N. C. 435 (1837).

[6] State v. Cooper, 238 N. C. 241, 77 S. E. 2d 695 (1953); State v. Beasley, 226 N. C. 579, 39 S. E. 2d 607 (1946).

[7] *In re* Stiers, 204 N. C. 48, 167 S. E. 382 (1933).

[8] State v. Thomas, 236 N. C. 196, 72 S. E. 2d 525 (1952).

[9] State v. Oxendine, 19 N. C. 435 (1837). Also Winesett v. Scheidt, 239 N. C. 190, 79 S. E. 2d 501 (1954); State v. Thomas, 236 N. C. 196, 72 S. E. 2d 525; *in re* Stiers, 204 N. C. 48, 167 S. E. 382 (1933).

[10] Louisiana State Bar Association v. Steiner, 204 La. 1073, 16 So. 2d 843 (1944); Louisiana State Bar Association v. Connolly, 201 La. 342, 9 So. 2d 582 (1942); Wilson v. Burke, 356 Mo. 613, 202 S. W. 2d 876 (1946); Neibling *et al.* v. Terry, 352 Mo. 396, 177 S. W. 2d 502 (1944); Kravis v. Hock, 136 N. J. L. 161, 54 A. 2d 778 (1947); Kravis v. Hock, 135 N. J. L. 259, 51 A. 2d 441 (Sup. Ct. 1947); Schireson v. State Board of Medical Examiners, 129 N. J. L. 203, 28 A. 2d 879 (Sup. Ct. 1942); State v. Estes, 130 Tex. S. Ct. Rep. 425, 109 S. W. 2d 167 (1939).

victed;[11] (2) where there is a statute which looks to conviction as a basis for revoking or suspending a license without specifying how the conviction shall be had, sentence upon the plea of *nolo contendere* may be considered the equivalent of a conviction.[12]

The decision in the principal case is based upon an earlier North Carolina decision.[13] In that case, defendant, an attorney at law, had pleaded *nolo contendere* to an indictment for embezzlement. Under the statute then in force,[14] disbarment proceedings predicated upon conviction for a felony were instituted. The Court held that the fact that he had pleaded *nolo contendere* could not be used against him in such proceeding because the plea does not amount to a conviction in open court. The principal case might have been distinguished on the ground that the statute in the *Stiers* case, *supra,* required a conviction "in open court" while G. S. 20-16 has no such requirement. However, no cases are found supporting such a distinction.

The concurring opinion in the principal case suggests that the Commissioner proceed to revoke the operator's license under G. S. 20-17, which directs that the Commissioner "forthwith revoke the license of any operator . . . upon receiving a record of such operator's . . . conviction" for drunken driving. This result is subject to the same objection, for the Commissioner would yet be revoking the license of a person who has not been "convicted" within the meaning ascribed to the word by the Court. One might even look askance at the clerk of court for having sent the record in the first place, since the applicable statute, G. S. 20-24(a), stipulates that the clerk forward to the Department of Motor Vehicles all driver's licenses held by the person *convicted,* "together with a record of such conviction." Assuming, as did the Judge in the concurring opinion, that this revocation would not be reviewable under G. S. 20-25,[15] still the problem is not hurdled, for the licensee might seek a writ of mandamus to force the return of his license,[16] or seek a writ of certiorari to review the action taken.[17]

Two other possibilities present themselves. First, the trial court might make surrender of the license a condition, agreed to by the li-

[11] Kravis v. Hock, 136 N. J. L. 161, 165, 54 A. 2d 778, 781 (1947). Schireson v. State Board of Medical Examiners, 129 N. J. L. 203, 208, 28 A. 2d 879, 881 (Sup. Ct. 1942).

[12] Neibling *et al.* v. Terry, 352 Mo. 396, 398, 177 S. W. 2d 502, 504 (1944).

[13] *In re* Stiers, 204 N. C. 48, 167 S. E. 382 (1933).

[14] N. C. CONSOL. STAT. 205 (1924) as amended by N. C. Pub. Laws 1929, c 64.

[15] "Any person denied a license or whose license has been cancelled, suspended, or revoked by the Department, except where such cancellation is mandatory under the provisions of this article, shall have a right to file a petition within thirty (30) days thereafter for a hearing in the matter in the superior court." N. C. GEN. STAT. § 20-25 (1953).

[16] Hinnekens v. Magee, 135 N. J. L. 537, 53 A. 2d 356 (Sup. Ct. 1947).

[17] *In re* Wright, 228 N. C. 584, 46 S. E. 2d 696 (1948); Hinnekens v. Magee, 135 N. J. L. 537, 53 A. 2d 356 (Sup. Ct. 1947).

censee, upon which sentence could be suspended. This course, however, poses an objection. Suppose that the licensee were subsquently found guilty of operating a motor vehicle without a license. This would be sufficient to result in execution of the suspended sentence. But suppose instead that he had entered the plea of *nolo contendere* to the second offense. In that event, our Court has held that the suspended sentence received in the first case may not be executed on the strength of the plea entered in the second, for proof of the violation must be made independent of the plea and independent of evidence or admission that such a plea was made.[18] Second, it is suggested that, the plea being one which may be entered not as a matter of right but only by leave of court, neither the court nor the prosecuting attorney need accept the proffered plea. While these suggestions have their advantages if strictly applied, neither solves but only seeks to avoid the basic problem presented.

In two states, Massachusetts and Pennsylvania,[19] the problem has been solved by statutory enactments. The Pennsylvania statutes are particularly clear in effect. The section corresponding to G. S. 20-16 provides that:

> The secretary may suspend the operating privileges of any person . . . upon receiving a record of proceedings . . . in which such person pleaded guilty, entered a plea of *nolo contendere,* or was found guilty by judge or jury, or whenever the secretary finds upon sufficient evidence [that certain enumerated offenses have been committed.][20]

The section that corresponds to G. S. 20-17 states:

> Upon receiving a certified record, from the clerk of court, of proceedings in which a person pleaded guilty, entered a plea of *nolo contendere,* or was found guilty by a judge or jury, of any of the crimes enumerated in this section, the secretary shall forthwith revoke . . . the operating privilege of any such person.[21]

While recognizing that the decision in the principal case is legally sound and is inevitable in view of the *Stiers* precedent, it is submitted that the great necessity for safety on our highways makes it desirable, even imperative, to revise the applicable statutes, bringing them into substantial agreement with the Pennsylvania statutes quoted above.

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[18] State v. Thomas, 236 N. C. 196, 72 S. E. 2d 525 (1952).

[19] The Massachusetts statute applies only to mandatory revocation. MASS. ANN. LAWS C. 90, § 24 (1946). The Pennsylvania Statutes, on the other hand, apply both to mandatory and discretionary revocation. PURDON'S PENNA. STAT. ANNO. C. 75, §§ 191, 192 (1953).

[20] PURDON'S PENNA. STAT. ANNO. C. 75, § 192 (1953).

[21] PURDON'S PENNA. STAT. ANNO. C. 75, § 191 (1953).

Municipal Corporations—Sunday Closing Ordinances—Reasonableness of Classification

Defendant, operator of a curb market in the City of High Point, kept his place of business open on Sunday, July 26, 1953, selling tomatoes, peaches, and toilet paper. He was found guilty of violating an ordinance of the City of High Point which made it unlawful for a place of business to open on Sunday for selling or offering for sale goods, wares, merchandise or services, but which excepted particular kinds of businesses furnishing certain enumerated articles of merchandise.[1]

On appeal, defendant contended that the basis of classification in the ordinance was arbitrary, unreasonable, and discriminatory in that the businesses permitted to remain open on Sunday sold certain articles of merchandise similar to those which he sold and were therefore his competitors. The Supreme Court of North Carolina, in *State v. Towery*,[2] held that defendant was in error in attempting to make competition between classes the test, rather than discrimination within a class, and that he had shown "no arbitrary or unreasonable exercise of the police power in the classification and selection of businesses to be closed on Sunday."[3]

The ordinance challenged in the *Towery* case is a common type of Sunday closing ordinance, containing a provision stating generally that all businesses will close on Sunday, with a second provision exempting certain types of businesses from the operation of the first. A necessary element of ordinances of this type is the classification of businesses, and such ordinances have been attacked as unconstitutional on the ground that the classification applied was arbitrary and unreasonable, or that it was discriminatory.[4] To be a valid classification, all those similarly

[1] Section 17.32 of The Code of the City of High Point, as amended June 17, 1952, which reads in part: "It shall be unlawful for any place of business to remain open for the purpose of selling or offering for sale goods, wares, merchandise or services between the hours of midnight Saturday and midnight Sunday, except as follows: hotels; boarding houses; restaurants; cafes, delicatessen and sandwich shops furnishing meals and selling bread, cooked or prepared meats incidental to the operation of such business; filling stations furnishing petroleum products and automobile accessories; garages furnishing repair work or storage; ice cream or confectionary stores, furnishing ice cream, cigars, tobacco, nuts and soft drinks only; cigar stands and newsstands furnishing cigars, tobacco, candies, nuts, newspapers, magazines and soft drinks only; drug stores furnishing medical or surgical supplies, cigars, tobacco, ice cream, candies, nuts, soft drinks, newspapers and magazines; ice dealers, for the manufacture and sale of ice; dairies, for the manufacture and sale of dairy products; bakeries, for the manufacture, sale and delivery of bakery products. . . ." Quoted in State v. Towery, 239 N. C. 274, 275, 79 S. E. 2d 513, 514 (1954).

[2] 239 N. C. 274, 79 S. E. 2d 513 (1954).

[3] *Id.* at 278, 79 S. E. 2d at 516.

[4] In addition to this type of Sunday closing ordinance, two other types have been challenged on the ground of arbitrary and unreasonable classification: (1) Where there is a general provision that all businesses must close on Sunday and a second provision exempting the sale of certain articles from the operation of the first; (2) Where there is no general closing provision and the ordinance requires

situated must receive equal treatment, and the classification must not be arbitrary or unreasonable.[5] It is not necessary, however, that it be made with "abstract symmetry" or with "mathematical nicety."[6] Classification in Sunday ordinances will generally be upheld if it rests upon any reasonable basis, and if it has any reasonable relation to the public health, morals, safety, or general welfare.[7]

Ordinances requiring businesses in general to close on Sunday, but exempting certain enumerated kinds of businesses, have generally been held to be reasonable and not arbitrary,[8] and a reasonable basis for a distinction between businesses is usually found.[9] In *State v. Medlin*,[10] an ordinance exempting drug stores for the sale of drugs all day on Sunday, and during certain specified hours on Sunday for the sale of "mineral waters, soft drinks, cigars and tobacco only," was held by the North Carolina court to be reasonable on the ground that since drug stores were open for the sale of drugs and medicines all day on Sunday, as a matter of necessity, they could be permitted to sell, during the specified hours, articles of common use which are to many persons "quasi-necessities."[11] Some courts have held, however, that such distinctions

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only a particular type of business to close. See Broadbent v. Gibson, 105 Utah 53, 140 P. 2d 939 (1943).

[5] City of Springfield v. Smith, 332 Mo. 1129, 19 S. W. 2d 1 (1929); State v. Trantham, 230 N. C. 641, 55 S. E. 2d 198 (1949); 6 McQUILLIN, MUNICIPAL CORPORATIONS § 24.192 (3rd ed., 1949).

[6] People v. Friedman, 302 N. Y. 75, 96 N. E. 2d 184 (1950).

[7] State v. McGee, 237 N. C. 633, 75 S. E. 2d 783 (1953).

[8] Lane v. McFadyen, ___ Ala. ___, 66 So. 2d 83 (1953); Richman v. Board of Commissioners of City of Newark, 122 N. J. L. 180, 4 A. 2d 501 (1939); People v. Friedman, 302 N. Y. 75, 96 N. E. 2d 184 (1950); State v. Sopher, 25 Utah 318, 71 Pac. 482 (1903); State v. Nichols, 28 Wash. 628, 69 Pac. 372 (1902).

[9] In *Ex parte* Sumida, 177 Cal. 388, 170 Pac. 823 (1918), an ordinance requiring businesses to close on Sunday, excepting (among others) bakeries, livery stables, drug stores, confectioneries, ice cream parlors and garages, was held not to be discriminatory, since in the case of the businesses excepted it was the custom to keep them open, as well as to some extent necessary to do so, since persons might need something from these businesses which they could not prepare for on Saturday nor wait for until Monday.

In Lane v. McFadyen, —— Ala. ——, ——, 66 So. 2d 83, 88 (1953), a statute prohibiting a "merchant or shopkeeper" from keeping open on Sunday, druggists excepted, was found to be a reasonable classification and not clearly arbitrary, the court stating that "in order to have a place where drugs might be obtained on Sunday, a bona fide druggist should be permitted to dispose of those articles usually and customarily sold in drug stores other than drugs." For discussion of this statute, see Comment, 5 ALA. L. REV. 349 (1953).

[10] 170 N. C. 682, 86 S. E. 597 (1915).

[11] It was further stated that it is not unreasonable to forbid other businesses to open even during the specified hours on the ground that "people might there congregate to the public scandal and to the dissatisfaction of the public, who expect a decent, reasonable observance of Sunday." State v. Medlin, 170 N. C. 682, 684, 86 S. E. 597, 598 (1915).

A reasonable basis has generally been found for ordinances singling out a particular class of business and prohibiting its operation on Sunday. People v. Krotkiewicz, 286 Mich. 644, 282 N. W. 852 (1938) (sale and distribution of groceries); Komen v. City of St. Louis, 316 Mo. 9, 289 S. W. 838 (1926) (bakeries); State v. Loomis, 75 Mont. 88, 242 Pac. 344 (1925) (dance halls); Mazzarelli v. City of

between businesses are arbitrary and unreasonable and not a valid exercise of the police power.[12] There must be a valid and substantial reason for the law to operate only upon certain classes rather than upon all, and it is not sufficient simply because all within a certain class are affected in the same way.[13]

Where classification in a Sunday ordinance permits a business to remain open on Sunday and sell articles of merchandise similar to those sold by a business prohibited from opening, is the ordinance discriminatory and unconstitutional? The more recent cases have generally found such ordinances to be arbitrary and unreasonable.[14] Such businesses are in competition with each other, are similarly situated with respect to the subject matter of the ordinance, and it is declared to be unreasonable and arbitrary to allow sales by an exempted business and deny that privilege to a business required to close.[15] Where such ordinances have been upheld, the courts reason that as long as all of one class are affected equally under the ordinance, it is reasonable and not arbitrary.[16]

Elizabeth, 11 N. J. Misc. Rep. 150, 164 Atl. 898 (Sup. Ct. 1933) (butcher shop); *Ex parte* Johnson, 77 Okla. Crim. 360, 141 P. 2d 599 (1943) (barber shop). For citation of cases sustaining similar ordinances and also cases holding them invalid, see 6 McQUILLIN, MUNICIPAL CORPORATIONS § 24.197 (3rd ed., 1949).

[12] Henderson v. Antonacci, 62 So. 2d 5 (Fla. 1952) (no reason why the health, morals, or general welfare would be better safeguarded by requiring used car dealers to close than by allowing them to operate along with proprietors of tourist attractions); City of Mt. Vernon v. Julian, 369 Ill. 447, 17 N. E. 2d 52 (1938) (no reason why the public welfare was served by closing a grocery store while a confectionery store remained open).

[13] Henderson v. Antonacci, 62 So. 2d 5 (Fla. 1952).

In Elliott v. State, 29 Ariz. 389, 242 Pac. 340 (1926), a closing ordinance was held to grant special privileges and immunities to certain classes of citizens while denying them to others without legal excuse, the court stating that it is not legitimate discrimination to close groceries, shoe stores, and hardware stores, while allowing jewelers, dealers in second-hand goods and tailoring establishments to open without restriction.

[14] Deese v. City of Lodi, 21 Cal. App. 2d 631, 69 P. 2d 1005 (1937); Allen v. City of Colorado Springs, 101 Colo. 498, 75 P. 2d 141 (1937); City of Mt. Vernon v. Julian, 369 Ill. 447, 17 N. E. 2d 52 (1938); Arrigo v. City of Lincoln, 154 Neb. 537, 48 N. W. 2d 643 (1951); Broadbent v. Gibson, 105 Utah 53, 140 P. 2d 939 (1943).

[15] Arrigo v. City of Lincoln, 154 Neb. 537, 48 N. W. 2d 643 (1951). There an ordinance requiring grocery stores and meat markets to close on Sunday, excepting, among other businesses, drug stores, cigar stores, ice cream parlors, and fruit stores, and providing that they should not sell groceries or articles ordinarily sold from a grocery store except fresh fruits, ice, bread and milk, was held invalid to the extent that it required grocery stores to close on Sunday, excluded them from exceptions permitting similar businesses to be open for necessary purposes, and barred them from the sale of fruits, ice, bread and milk.

A statute discriminates between persons similarly situated, which permits confectionery stores to open on Sunday and sell soft drinks and confections while grocery stores selling the same items have to close. Broadbent v. Gibson, 105 Utah 53, 140 P. 2d 939 (1943).

There is no basis for the discrimination by an ordinance under which a drug store can sell staple groceries on Sunday, while the operator of a grocery store is prohibited from selling the same items. Allen v. City of Colorado Springs, 101 Colo. 498, 75 P. 2d 141 (1937).

[16] State v. Nicholls, 77 Ore. 415, 151 Pac. 473 (1915) (defendant contended

In the prior North Carolina case of *State v. Trantham*,[17] the court indicated that a Sunday ordinance might be unreasonably discriminatory if under it there was competition between a permitted and a prohibited business in the same articles of merchandise, the permitted business being allowed to sell them on Sunday. The court there stated, in holding that defendant could not challenge the constitutionality of an ordinance[18] similar to the one in the *Towery* case, that it was not made to appear that defendant kept in stock for sale one of the enumerated salable articles,[19] and that no competitor of his had been accorded a privilege which was denied to him. Only where there is discrimination between those of a particular group or class who are similarly situated with reference to the subject matter of the legislation is the ordinance unconstitutional.[20]

Under the *Towery* case, however, classification is declared not discriminatory although articles of merchandise permitted to be sold on Sunday by an exempted business are also sold by a business prohibited from opening on Sunday.[21] The court relies on *State v. Medlin*, where

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that his cigar store, selling cigars and candy, had to close on Sunday while under the same statute a drug store might open and sell the same items; yet the statute was held reasonable since it applied to all persons coming within the prohibited class, and the businesses excepted "minister to wants more imperative"); Richman v. Board of Commissioners of City of Newark, 122 N. J. L. 180, 4 A. 2d 501 (1939) (ordinance was attacked as discriminatory and unreasonable in prohibiting the opening of grocery stores and not affecting other merchants, many of whom sold foodstuffs not classified as groceries, but was found valid since it was general and applied to all grocery stores in the city without exception); State v. Cranston, 59 Idaho 561, 85 P. 2d 682 (1938) (statute limiting exemptions to places *primarily* established for the sale of certain necessaries or where the articles are made or produced is not unjust discrimination, since it is not necessary to exempt all businesses where such articles *might* be sold).

[17] 230 N. C. 641, 55 S. E. 2d 198 (1949).

[18] The ordinance had a general closing provision with a proviso that it did not apply to "garages and filling stations, drug stores, cigar stores, confectionery stores, shops, stands and bakeries which shall be allowed to operate on Sunday for the sale of gas and oil, drugs, medicines, druggist sundries, cigars, tobacco, fruits, ice, ice cream, confections, nuts, soda and mineral waters, bread, pies, cakes, newspapers, periodicals, and for no other purpose." Section 199 of the Code of the City of Asheville, as quoted in State v. Trantham, 230 N. C. 641, 642, 55 S. E. 2d 198, 199 (1949).

[19] The defendant had sold groceries on Sunday.

[20] State v. Trantham, 230 N. C. 641, 55 S. E. 2d 198 (1949). *Cf.* State v. McGee, 237 N. C. 633, 75 S. E. 2d 783 (1953), where the defendant, operator of a motion picture theater, challenged the validity of a city ordinance permitting theaters charging a fee to operate only during specified hours on Sunday, on the ground it discriminated against him in that it permitted radio and television stations to operate while he was required to be closed. The court, after stating that defendant did not claim the ordinance discriminated against him insofar as it applied to persons similarly situated and engaged in the theater business, held that the motion picture theater was an entirely different business from a radio or television station, and further, that no fee was charged to listen to the radio or watch a television show.

[21] It would seem there is room for argument as to whether a grocery store should be in a different class from a drug store, in regard to articles of merchandise which they both ordinarily sell. Could it not be argued that the two businesses are similarly situated with regard to those articles?

the ordinance construed excepted drug stores for the sale of "drugs, medicines, mineral waters, soft drinks, cigars and tobacco only," but the ordinance in the principal case excepted drug stores furnishing enumerated items, not *expressly* limiting them to sales of such items *only*. Whether a drug store could sell staple groceries on Sunday under the ordinance the court does not decide, and it is open to question whether the court would hold an ordinance discriminatory under such circumstances.

Ordinances such as the one considered in the *Towery* case seem to place more significance upon the name of the business than upon what business it in fact does. Where an ordinance excepts drug stores from its operation, for instance, should a store still be considered a drug store although its primary business consists of the sale of articles other than drugs and medicines? It has been stated that at the present time "a 'drug store' could mean anything from a place where drugs alone are sold to one where anything from an aspirin tablet to an automobile could be purchased."[22] It is submitted that the better Sunday closing ordinance is one with a general closing provision and which does not except particular kinds of businesses from its operation, but rather excepts only enumerated articles or items which can be sold on Sunday.[23]

CALVIN C. WALLACE

Negotiable Instruments—Defenses of Lack and Failure of Consideration as Affected by Seal

In an action on promissory notes under seal, it was held that if the defendant could show a total failure of consideration, this would be a good defense, since the presumption of consideration arising from the seal is rebuttable.[1]

The origin of the seal is traceable to times when few people could write, and accordingly identified themselves by the use of a distinctive

[22] *See* Henderson v. Antonacci, 62 So. 2d 5, 10 (Fla. 1952) (concurring opinion).

[23] Statutes with this type of classification have generally been upheld. State v. Justus, 91 Minn. 447, 98 N. W. 325 (1904); State v. Diamond, 56 N. D. 854, 219 N. W. 831 (1928); People v. Zimmerman, 48 Misc. Rep. 203, 95 N. Y. Supp. 136 (Sup. Ct. 1904).

Under such a statute, it has been said that where tobacco and candy are excepted from its operation, a large department store could open for the sale of those items, although there is doubt whether it would be economically feasible for them to do so. State v. Grabinski, 33 Wash. 2d 603, 206 P. 2d 1022 (1949).

Such an ordinance has been held arbitrary in permitting the sale of a can of beer on Sunday, while prohibiting the sale of a can of orange juice or coffee. Gronlund v. Salt Lake City, 113 Utah 284, 194 P. 2d 464 (1948).

[1] Mills v. Bonin, 239 N. C. 498 (1954). The distinction between *want* and *failure* of consideration should be noted. "Want of consideration embraces transactions or instances where none was intended to pass, while failure of consideration implies that a valuable consideration, moving from obligee to obligor, was contemplated." *In re* Killeen's Estate, 310 Pa. 182, 187, 165 Atl. 34, 35 (1932).

personal seal. This use of the seal as a means of identification antedated the contract theory of consideration, and when that doctrine arose, the exception of sealed instruments from its application became a part of the substantive law.[2]

A clear statement of this exception was made in *Walker v. Walker*,[3] where in an action on a sealed promissory note, the court stated that it is "not aware of any rule of law by which a consideration is inferred from the fact of the execution of a sealed instrument. No consideration is necessary in order to give validity to a deed."[4] The presence or absence of consideration apparently could not be inquired into, as none was necessary;[5] therefore, lack of consideration would be no defense to an action on the note.

In several decisions subsequent to the *Walker* case the North Carolina court states that "a note under seal *imports* a consideration," which might mean that the seal only creates a rebuttable presumption, so that lack of consideration, once proved, would be a defense to an action on a sealed note.[6] Regardless of what language it may use, however, the court has uniformly reached the result that lack of consideration is no defense to liability on a note under seal. It would seem that this result is against the weight of authority, which recognizes that the Uniform Negotiable Instruments Law makes lack of consideration a defense against anyone not a holder in due course in these cases.[7] North Caro-

[2] BLACKSTONE, COMMENTARIES 493 (Gavit ed. 1892); HOLMES, THE COMMON LAW 273 (1881).

[3] 35 N. C. 335 (1852).

[4] *Id.* at 336.

[5] Ducker v. Whitson, 112 N. C. 44, 16 S. E. 854 (1893) (notes were intended as a gift).

[6] Angier v. Howard, 94 N. C. 27, 29 (1886). Similar language is used in Cowen v. Williams, 197 N. C. 432, 149 S. E. 396 (1929); Moose v. Crowell, 147 N. C. 551, 61 S. E. 524 (1908); Ducker v. Whitson, 112 N. C. 44, 16 S. E. 854 (1893). In Webster v. Bailey, 118 N. C. 193, 194, 24 S. E. 9, 10 (1896), the court states that "the law conclusively presumes that it was made upon good and sufficient consideration." Burriss v. Starr, 165 N. C. 657, 81 S. E. 929 (1914), quotes the accurate language of Walker v. Walker, 35 N. C. 335 (1852), and Harrell v. Watson, 63 N. C. 454 (1869), uses language similar to that in the *Walker* case. See 1 CORBIN, CONTRACTS § 252 (1950).

[7] St. Paul's Episcopal Church v. Fields, 81 Conn. 870, 72 Atl. 145 (1909); Italo-Petroleum Corp. of America v. Hannigan, 1 Ter. 500, 14 A. 2d 401 (Del. 1940); Citizens' Bank of Blakely v. Hall, 179 Ga. 662, 177 S. E. 496 (1934); Citizens' Nat. Bank v. Custis, 153 Md. 235, 138 Atl. 261 (1927) (all decided under the NIL). *Contra:* Shinn *et al.* v. Stemler, 150 Pa. Super. 350, 45 A. 2d 242 (1946) (want of consideration is no defense, although failure of consideration is; case decided in absence of NIL).

Lack of consideration would appear to be a valid defense, however, if the action is brought in equity. The court in Woodall v. Prevatt, 45 N. C. 199, 201 (1853), said that "while in law a seal imports a valuable consideration which is conclusive, in equity a seal only raises a presumption of a valuable consideration which may be rebutted." See Thomason v. Bescher, 176 N. C. 622, 97 S. E. 654 (1918). And Dean Roscoe Pound has written, "although courts of equity are accustomed to say they will not aid a volunteer, and will not give specific performance of a contract under seal where there is no common law consideration, they enforce options under seal." Pound, *Consideration in Equity*, 13 ILL. L. REV. 667, 676 (1918).

lina cases fail to refer to the NIL in this situation and apparently treats those cases decided before its enactment in 1899 no differently from those decided afterward.[8]

The principal case concerns failure of consideration, and apparently the rule relied upon was first announced in *Farrington v. McNeill.*[9] Without discussion or citation of authority, the court in that case simply concluded its opinion by stating that "it is true, the note in this case is under seal, which purports a consideration, but such presumption is rebuttable as between the parties thereto."[10] Where the *Farrington* case has been cited by our court for this rule, it has always been in a case treated as one involving a failure of consideration, and not lack of consideration; but the statement of the rule is not so limited on its face.[11] Yet it is doubtful whether the rule could have any reasonable application except to a lack of consideration, for since the use of a seal "imports" a consideration at the inception of the agreement, it could hardly have any bearing on the issue of whether consideration actually bargained for

[8] The basis for the rule in other jurisdictions is NIL § 6(4), which provides that "the validity and negotiable character of an instrument are not affected by the fact that . . . [it] bears a seal." N. C. GEN. STAT. § 25-12 (1953). This, the courts say, makes the sealed note a negotiable instrument within the NIL, and therefore subject to NIL § 24, which provides that "every negotiable instrument is deemed prima facie to have been issued for a valuable consideration," N. C. GEN. STAT. § 25-29 (1953), and also to NIL § 28, which provides that "absence *or* failure of consideration is a matter of defense as against any person not a holder in due course." N. C. GEN. STAT. § 25-33 (1953). See Citizens' Nat. Bank v. Custis, 153 Md. 235, 239, 138 Atl. 261, 263 (1927), where it is stated that the instrument is negotiable paper under the uniform act, and "by statutory conversion loses its position and quality as a specialty to the extent of both its negotiable characteristics and of its validity or legal sufficiency as a negotiable instrument."

North Carolina has always declared that a sealed note could be negotiated, Marsh v. Brooks, 33 N. C. 409 (1850), and therefore would seemingly need not employ N. C. GEN. STAT. § 25-12 (1953) to declare that a sealed note is negotiable; while in many other jurisdictions, before the NIL, a sealed note was a specialty (called a 'bill single'), which was non-negotiable. *Ex parte* First Nat. Bank of Ozark, 212 Ala. 274, 102 So. 371 (1924); Brown v. Jordahl, 32 Minn. 135, 19 N. W. 650 (1884); McLaughlin v. Braddy, 63 S. C. 433, 41 S. E. 523 (1901).

In Perry v. First Citizens National Bank & Trust Co., 226 N. C. 667, 40 S. E. 2d 116 (1946), the court cited N. C. GEN. STAT. § 25-33 (1953) in support of its holding that a failure of consideration is a valid defense to a note under seal. The same result apparently could be reached in cases involving a lack of consideration.

[9] 174 N. C. 420, 93 S. E. 957 (1917).

[10] *Id.* at 422, 93 S. E. at 958. Compare this with the language quoted earlier from Walker v. Walker, 35 N. C. 335 (1852), where the court said consideration was not necessary to a sealed instrument.

[11] Patterson v. Fuller, 203 N. C. 788, 167 S. E. 74 (1932). An ideal situation was presented here for the exact definition of our status regarding lack or failure of consideration as a defense, as the defendant attempted to construe Burriss v. Starr, 165 N. C. 651, 81 S. E. 929 (1914), a case involving a lack of consideration, so as to include a failure of consideration. The court left the situation still in doubt. Royster v. Hancock, 235 N. C. 110, 69 S. E. 2d 29 (1951); Perry v. First Citizens National Bank & Trust Co., 226 N. C. 667, 40 S. E. 2d 116 (1946); Lentz v. Johnson & Sons, Inc., 207 N. C. 614, 178 S. E. 226 (1934).

has subsequently failed.[12] However this may be, the rule that failure of consideration is a defense to an action on a sealed promissory note is in accord with the weight of authority.[13]

Although in the *Farrington* case it was expressly stated that a failure of consideration was involved, in many cases the court does not state clearly whether the problem in the particular case involves a lack or a failure of consideration; and in no case is there any discussion of the distinction between the two. Since lack of consideration is no defense, while failure of consideration may be shown in an action on a sealed note in this jurisdiction, it is felt that an express statement as to which is being dealt with is needed in each instance. Especially in *Lentz v. Johnson & Sons, Inc.*,[14] is it questionable whether the court recognized the difference between a lack and a failure of consideration. There the plaintiff held notes made by the defendant's brother, and at the plaintiff's request, so as to make the situation appear better to the bank examiners, the defendant signed his name to the notes. It would seem that the parties never intended any consideration to be present, and therefore a lack of consideration would be involved, but the court nevertheless applied its rule as to failure of consideration without any discussion as to which was present.

Although most of the other jurisdictions deal with sealed promissory notes under the provisions of the NIL, and consequently treat them separately from general contracts under seal,[15] there seems to be no distinction made between the treatment of notes under seal and contracts under seal in this jurisdiction.[16] And just as in the case of a note

[12] Williston, speaking of contracts under seal, points out that a sharp distinction must be made between a lack and a failure of consideration since a failure of consideration is a defense to an action on the contract. 1 WILLISTON, CONTRACTS § 109 (Rev. ed., 1936). It seems this would be equally true of a note under seal.

[13] Citizens' Bank of Blakely v. Hall, 179 Ga. 662, 177 S. E. 496 (1934); Citizens' Nat. Bank v. Custis, 153 Md. 235, 138 Atl. 261 (1927) (both decided under the NIL). Shinn *et al.* v. Stemler, 150 Pa. Super. 350, 45 A. 2d 242 (1946) (decided in absence of NIL). Although several North Carolina cases involving a failure of consideration cite N. C. GEN. STAT. § 25-33 (1953), see note 8, *supra*, apparently little reliance is placed thereon.

[14] 207 N. C. 614, 178 S. E. 226 (1934).

[15] *Ex parte* First Nat. Bank of Ozark, 212 Ala. 274, 102 So. 371 (1924). The court there points out that a sealed note at one time was a specialty, and even when a state statute provided that the consideration of a sealed instrument could be attacked, it had no application to sealed notes. It was not until the NIL was enacted that a sealed note was relieved of the effect of its seal. But see BLACKSTONE, COMMENTARIES 493 (Gavit ed. 1892), where it is stated that a note "is little more than an ordinary contract" between the original parties.

[16] Apparently notes under seal and contracts under seal are treated interchangeably. In Coleman v. Whisnant, 226 N. C. 258, 37 S. E. 2d 693 (1946), the action was on a contract under seal, and to support its decision that consideration was not necessary, the court relied upon Harrell v. Watson, 63 N. C. 454 (1869), which involved a bond (a note under seal), and the *Harrell* case was in turn aided in its determination by the fact that a *deed* needs no consideration. Thomason v. Bescher, 176 N. C. 622, 97 S. E. 654 (1918), dealt with an option, but quoted from the *Harrell* case.

under seal, it appears that lack of consideration is not available as a defense to a contract under seal.[17] This also remains the view, as regards contracts, in those jurisdictions which have not yet changed by statute the effect of the seal.[18]

Apparently North Carolina has no cases involving a failure of consideration in the case of a general contract under seal, although the same criticism made previously with respect to sealed notes is valid here also—namely, that the court does not indicate that it is aware of the distinction between a lack and a failure of consideration in these cases involving sealed instruments. In two cases[19] there were recitals of mutual promises in the contracts involved, which it seems would involve a failure of consideration. Nevertheless, the court apparently considered only the issue of lack of consideration, as it was stated that under "the common law, which still obtains in this jurisdiction, instruments under seal are generally held to be good as against a plea by one of the parties of *no* consideration, because the seal imports consideration or renders it unnecessary."[20] As regards other jurisdictions in the matter of failure of consideration of a contract, Professor Williston, writing on sealed instruments, states that "at the present time there is no doubt that failure of consideration would everywhere be held a defense."[21]

In view of the desirability of having a rule that is as definite in statement and as simple of application as a rule can be, perhaps by applying our statutes on negotiable instruments to notes under seal we could at least enjoy the convenience of having only one rule to apply, whether a lack *or* a failure of consideration was involved.[22] We could thereby do away as well with the burden of having first to decide whether the case concerns a lack or a failure of consideration. And as for general contracts under seal, perhaps it would not be unwise to join the majority of states which have already enacted legislation abolishing the distinction between sealed and unsealed instruments.[23]

DONALD R. ERB

[17] Crotts v. Thomas, 226 N. C. 385, 38 S. E. 2d 158 (1946); Samonds v. Cloninger, 189 N. C. 610, 127 S. E. 706 (1925); Thomason v. Bescher, 176 N. C. 622, 97 S. E. 654 (1918).

[18] Wagner v. McClay, 306 Ill. App. 560, 138 N. E. 164 (1923); Zirk v. Nohr, 127 N. J. Law 217, 21 A. 2d 766 (1941); Poelcher v. Poelcher, 366 Pa. 3, 76 A. 2d 222 (1950); Bandy v. Bandy, 187 S. C. 410, 197 S. E. 396 (1938). See RESTATEMENT, CONTRACTS § 110 (1932); 1 WILLISTON, CONTRACTS § 217 (Rev. ed. 1936).

[19] Coleman v. Whisnant, 226 N. C. 258, 37 S. E. 2d 693 (1946); Basketeria Stores, Inc. v. Public Indemnity Company, 204 N. C. 537, 168 S. E. 822 (1933).

[20] Coleman v. Whisnant, 226 N. C. 258, 260, 37 S. E. 2d 693, 694 (1946).

[21] 1 WILLISTON, CONTRACTS § 109 (Rev. ed. 1936). But see Harvey v. Ryan, 59 W. Va. 134, 53 S. E. 7 (1906), pointing out that failure of consideration is no defense at common law, but is made so today by statute. *Contra:* Goodwin v. Cabot Amusement Co., 129 Me. 36, 149 Atl. 574 (1930), where it is said the defense of failure of consideration is no more potent than that of want of consideration.

[22] See statutes and cases cited note 8 *supra.*

[23] 1 WILLISTON, CONTRACTS § 218 (Rev. ed. 1936).

Taxation—Federal Estate Taxation—Retention of Power to Terminate Trusts

Since the decision in *Commissioner v. Estate of Holmes*[1] the law has been settled that the retention by the settlor of a trust of the power to terminate that trust is such a power as contemplated by Section 811(d) of the Internal Revenue Code,[2] if there are contingent beneficiaries under the trust. Therefore, where the power to terminate is retained it will be subject to the estate tax. The Court in *Holmes* stated:

> It seems obvious that one who has the power to terminate contingencies upon which the right of enjoyment is staked, so as to make certain that a beneficiary will have it who may never come into it if the power is not exercised, has power which affects not only the time of enjoyment but also the person or persons who may enjoy the donation. More therefore is involved than mere acceleration.[3]

To the taxpayer's contention that the interests were vested, the Court said, ". . . 'enjoyment' and 'enjoy,' as used in these and similar statutes, are not terms of art but connote substantial present economic benefit rather than technical vesting of title or estates."[4]

The question then arose, what effect does Section 811(d) have on a power to terminate where there is a beneficiary or are beneficiaries who have the equitable fee in trust, and where there are no contingent interests involved? The Court of Appeals for the Fifth Circuit in *Hay's*

[1] Commissioner v. Estate of Holmes, 326 U. S. 480 (1936). In this case the decedent had created trusts for the benefit of his sons. They were to continue for fifteen years, unless sooner terminated by the decedent. The decedent, as trustee, was authorized in his discretion either to distribute or to accumulate the income. On the death of any beneficiary his share was to go to his surviving issue, or if none, to his surviving brothers or their issue, or if deceased, to the decedent's wife. The Supreme Court held the value of the trust to be includible in the decedent's gross estate as an interest whereof the "enjoyment" was subject at the date of his death to change through the exercise of a power to "alter, amend, or revoke."

[2] INT. REV. CODE 811(d) provides in substance that "the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property . . . to the extent of any interest therein of which the decedent has at any time made a transfer . . . where the enjoyment thereof was subject at the date of his death to change through the exercise of a power . . . by the decedent alone or by the decedent in conjunction with any other person . . . to alter, amend, revoke, or terminate. . . ." Section 811(d) is composed of two paragraphs, the first of which is applicable to transfers after June 22, 1936. The second paragraph is applicable to transfers on or prior to that date and is the same with a few minor differences, the most notable being that the word "terminate" is not included. However, the Supreme Court in *Holmes* declared that the addition of the word "terminate" was declaratory of existing law prior to 1936.

It should be noted that the power to terminate is different from the power to revoke in that by terminating a trust the principal and accumulated income go to the beneficiary then entitled to the income from the trust, while by revoking, the principal and accumulated income return to the settlor. Therefore, when a settlor retains the power to terminate he is not reserving a power to subsequently bring the trust back to himself; he is reserving the power to shorten the life of the trust.

[3] Commissioner v. Estate of Holmes, 326 U. S. 480, 487 (1936).

[4] *Id.* at 486.

Estate v. Commissioner[5] held that such a trust would not be includible in the decedent's estate. In that case the decedent had transferred land to herself as trustee for the benefit of her four children and the heirs at law of any of the children who died during the continuance of the trust. The trustee was to pay to the beneficiaries in her discretion the income, and the trust was to continue until the death of the settlor unless the settlor, as trustee, terminated it prior thereto. On termination the principal and accumulated income were to be distributed to the beneficiaries, or to their heirs by the law of descent. The Commissioner of Internal Revenue relied on the *Holmes* case and contended that the decedent could change the enjoyment of the trust property by exercising the power to terminate. The court rejected this contention, holding that, since the beneficiaries had a vested equitable fee in the trust,[6] the decedent had no power over who should enjoy the property.[7]

A contrary result was reached by the Court of Claims in *Lober v. United States*.[8] There, the settlor created trusts providing that the principal should be paid over to the beneficiaries on their reaching the age of twenty-five. The settlor, as trustee, held the power to accumulate the income until the beneficiaries became of age. The trustee could also pay over a part or all of the principal to the beneficiaries, so that he had in effect a power to terminate. The trust instrument made no provision for a gift over in the event of the death of a beneficiary, but the court decided the case on the assumption that, under New York law where the trust was created, it would go to the beneficiaries' heirs and not back to the settlor. The Government urged that *Holmes* was controlling. The plaintiffs contended that *Holmes* was distinguishable. The Court of Claims agreed with the Government's position, however, and held that the reasoning in the *Holmes* case was conclusive upon it. They said: "A father who has the power to decide that his son should have certain assets to use, enjoy, spend, waste or invest, or to decide that he shall

[5] Hay's Estate v. Commissioner, 181 F. 2d 169 (5th Cir. 1950).

[6] The court said that under the applicable state law (Mississippi) the words "heirs" was not necessary to create an estate of inheritance, as every estate in land is deemed a fee simple if a less estate be not clearly intended. *Id.*, at 173.

[7] *Cf.*, Estate of Barney v. Kelm, 53-2 U. S. T. C. ¶ 10,915, where the court in a very similar case pointed out that if the trustees did accumulate the income and not pay it over to the principal beneficiary, nevertheless, upon the death of the beneficiary the entire trust would pass to his estate out of which the creditors would be able to obtain satisfaction. The court said that while the trust fund would be immune from the claims of creditors during the life of the beneficiary, upon his death the limitation of the trust indenture in that regard would not apply. Consequently, the beneficiary during his life time would enjoy the benefits of the fund and the credit standing it would afford him even though the fund was not paid to him until the termination of the trust or to his estate upon his death.

But see Zirjacks v. Scoffield, 197 F. 2d 688 (1952). There the Fifth Circuit held that a similar case was covered by Section 811(d)(1). They said the law of Texas governed this trust and it was different from Mississippi's.

[8] Lober v. United States, 108 F. Supp. 731 (Ct. Cl. 1952).

not have them at all for any of these purposes, but that his creditors, his children, wife or collateral relatives should have them, has a significant control over assets. We think it is substantially the kind of control which the Supreme Court was dealing with in *Commissioner v. Holmes.*"[9]

Because of this conflict in the lower courts, the Supreme Court granted certiorari in the *Lober* case.[10] In that Court the taxpayer again urged that *Holmes* was distinguishable on the grounds that there the decedent had selected contingent beneficiaries who should take on the death of the principal beneficiaries, while in the *Lober* trusts the decedent had no control over who would take in the event of the death of a beneficiary. The Court, in a brief opinion, rejected this contention, and relying on the *Holmes* case, said that they were "more concerned with 'present economic benefit' than with 'technical vesting of title or estates.' And the *Lober* beneficiaries were granted no 'present right to immediate enjoyment of either income or principal.' "[11] Thus, the Court concluded that, if a settlor retains the power to terminate a trust, even where the beneficiary has a vested interest, it will be includible in his gross estate for estate tax purposes.

The question arises as to whether the whole value of the trust property should be held subject to the estate tax. It would appear that at most only accumulated income should be taxed. For it has been said that:

> Where by the terms of the trust a restraint on the alienation of the right to receive the income but no restraint on the alienation of the right to receive the principal is imposed, the creditors of the beneficiary are entitled to a decree that the beneficiary's interest in the principal should be sold.[12]

This would seem to give the beneficiary in a state which recognizes that the beneficiary has the equitable fee in the trust the power to assign the remainder interest held during the continuance of the trust. Having the right to do this, he would have at least the present right of enjoyment in the remainder. Further, if the beneficiary's interest were not subject to spendthrift provisions, the beneficiary could assign the entire fee during the continuance of the trust.[13] Thus, it would seem that he would have the present enjoyment of the whole fee of the trust under such circumstances.

The decision of the Supreme Court in *Helvering v. Helmholz*[14] should

[9] *Id.* at 733.
[10] Lober v. United States, 74 S. Ct. 98 (1953); certiorari granted in 345 U. S. 969 (1953).
[11] Lober v. United States, 74 S. Ct. 98, 99 (1953).
[12] I SCOTT, TRUSTS § 152.5, p. 761 (1939). See also 65 C. J., *Trusts* § 303, p. 550 (1933).
[13] I SCOTT, TRUSTS § 132, p. 699 (1939).
[14] Helvering v. Helmholz, 296 U. S. 93 (1935).

be noted at this point. It was held there that the retention of the power to terminate by the decedent would not subject the trust to the estate tax, if the trust indenture specified that the trust could be terminated only with the consent of all the beneficiaries. Justice Roberts speaking for the majority said: "The general rule is that all parties in interest may terminate the trust.[15] The clause in question added nothing to the rights which the law conferred. Congress cannot tax as a transfer intended to take effect in possession or enjoyment at the death of the settlor a trust created in a state whose law permits all the beneficiaries to terminate the trust."[16] The Treasury Regulations are now in accord with this holding.[17] Thus, if Lober had not included the power to terminate the trust it would not have been subjected to the estate tax, as under the applicable state law the settlor of a trust can terminate the trust if he obtains the consent of all parties in interest.[18] And, practically speaking, he would still have the same control, as it can be fairly assumed that the consent of the sole beneficiary would be easily obtainable.

The *Lober* decision, thus, seems to be penalizing the less tax conscious settlor. While the fact that the consent of the beneficiaries would be a substantial power where there are contingent beneficiaries who would hesitate in giving away their possibility in the trust, the same would not be true where there was only a single beneficiary who held the whole fee in the trust property. It would therefore seem that the Supreme Court should be concerned with "technical vesting of titles and estates," despite what was said in the principal case.

JOHN G. HUTCHENS

Torts—Libel and Slander—Liability of Law Enforcement Officers for Defamation Contained in Official Communications

One of the many problems arising to confront those engaged in the enforcement of the criminal law is that of the liability of law enforcing officers for libel and slander contained in their reports to superiors and in their communications with other officers.

For example, an investigating officer can often put into his reports not only statements of fact, but also much in the nature of inference, conclusions, surmise, etc., which he is able to draw from his observations, evaluated in the light of his own training and experience. Such things might be characterized as "policeman's hunches." It goes without say-

[15] In so holding the Court cited the RESTATEMENT, TRUSTS §§ 337, 338 (1935).
[16] Helvering v. Helmholz, 296 U. S. 93, 97 (1935).
[17] U. S. TREAS. REG. 105, § 81.20(b)(3) (1939).
[18] N. Y. PERS PROP. LAW § 23; N. Y. REAL PROP. Law § 118; McEvoy v. Central Hanover Bank & Trust Co., 274 N. Y. 27, 8 N. E. 2d 265 (1937).
See also N. C. GEN. STAT. §§ 39-6, 39-6.1 (1950) for the comparable North Carolina law on this point. It is provided there that the grantor in a voluntary conveyance may revoke the interest of any person not *in esse*.

ing that such material is extremely valuable to other officers, to those guiding the over-all investigation, and to prosecutors.

A fear of civil liability for defamatory statements of this type has led to policies in many law enforcement agencies of allowing only statements of fact to be included in investigative and arrest reports, while matters of opinion are transmitted orally, or in some instances by inter-agency memoranda, access to which is closely restricted. The disadvantages of these methods (particularly the former) from the standpoint of efficiency can readily be seen. In view of the increasing volume and significance of this work, it seems important that some clarification of the situation be attempted, with the view that the service of these agencies to the public should not be unnecessarily restricted, and that these officers should know the extent of their protection from civil liability while engaged in the discharge of their duties.

The law of libel and slander recognizes that statements which would otherwise be defamatory may be made on certain occasions where the defamer should be allowed to speak his mind freely in the furtherance of some important public interest, and it makes the existence of these occasions defenses to suits for libel and slander. Thus defamatory statements published on such privileged occasions are called "privileged communications."[1] They are of two types: "absolute," and "qualified" or "conditional."

In cases of absolute privilege, immunity is granted the defamer regardless of the falsity of the communication, his knowledge of that falsity, or the motives which prompt him to make it. Originally, this privilege was narrowly restricted to legislative and judicial proceedings and to reports of military officers to superiors. In more recent years, however, the courts have extended it to executive officers of the government. The case of *Spalding v. Vilas*,[2] where absolute immunity was granted a federal cabinet officer, may be considered as representing the first step in this direction.[3] The privilege has subsequently been extended not only to heads of executive departments of the government, but also to inferior officers of such departments when engaged in the discharge of their duties.[4]

[1] It is helpful to recognize that it is the *occasion* which is privileged. The communication made on a privileged occasion may not, for reasons discussed below, always be privileged.

[2] 161 U. S. 483 (1896); Matson v. Margiotti, 371 Pa. 188, 196, 88 A. 2d 892, 896 (1952).

[3] Glass v. Ickes, 117 F. 2d 273, 132 A. L. R. 1328 (D. C. Cir. 1940), *cert. denied*, 311 U. S. 718 (1940) (Secretary of the Interior).

[4] Farr v. Valentine, 38 App. D. C. 413, Ann. Cas. 1913C, 821 (1912) (Commissioner of Indian Affairs of the Department of the Interior); DeArnaud v. Ainsworth, 24 App. D. C. 167, 5 L. R. A. (NS) 163 (1904), *writ of error dismissed*, 199 U. S. 616 (1905) (chief of the Record and Pension Office of the War Department).

The federal courts seem to be more liberal than most state courts in extending this absolute privilege.[5] Where the communication was made to a superior officer, the privilege has been granted by federal courts to a consul,[6] a naval officer,[7] and an internal revenue agent.[8] Some state courts have also extended the unqualified privilege rather far.[9] Two cases in which such a privilege was granted to communications passing between law enforcement officers engaged in investigating a crime are *Stivers v. Allen*,[10] and *Catron v. Jasper*.[11] Unfortunately, some state courts have carried the privilege to unwarranted extremes.[12] The recent case of *Matson v. Margiotti*[13] is an example of the abuses

[5] Note, 33 ILL. L. REV. 358 (1938).

[6] United States to Use of Parravicino v. Brunswick, 69 F. 2d 383 (D. C. Cir. 1934).

[7] Miles v. McGrath, 4 F. Supp. 603 (D. Md. 1933), Note, 12 N. C. L. REV. 170 (1934).

[8] Harwood v. McMurtry, 22 F. Supp. 572 (W. D. Ky. 1938). Considerations against affording protection to officers for false and malicious statements are outweighed by an "imperative public policy that perfect freedom in the discharge of public duties is essential to the maintenance of efficient public service and must be preserved without restraint." *Id.* at 573.

[9] *E.g.*, Powers v. Vaughn, 312 Mich. 297, 20 N. W. 2d 196 (1945) (officials of health department).

[10] 115 Wash. 136, 196 Pac. 663 (1921).

[11] 303 Ky. 598, 198 S. W. 2d 322 (1946). The court regarded an absolute privilege as "essential for the enforcement of the . . . law. . . ." *Id.* at 604, 198 S. W. 2d at 325.

[12] In Donner v. Francis, 255 Ill. App. 409 (1930), one defendant was the officer in charge of a U. S. Veterans' Hospital; the other was plaintiff's immediate superior. The court said: "*All* communications, either verbal or written, passing between *public officials* pertaining to their duties and in the conduct of public business are of necessity absolutely privileged and such matters cannot be made the basis of recovery in a suit at law." (emphasis added) *Id.* at 413. In Haskell v. Perkins, 165 Ill. App. 144 (1911), defendant, plaintiff's superior, filed charges against plaintiff with a board of education, their employer. However, each of the foregoing decisions might be explained by remarks of the courts that the proceedings therein were in the nature of quasi-judicial proceedings. Absolute immunity was granted to private citizens who petitioned the Board of County Commissioners for revocation of plaintiff's liquor license in Lininger v. Knight, 123 Colo. 213, 226 P. 2d 809 (1951).

Proceedings and communications of quasi-legislative and quasi-judicial agencies are sometimes granted absolute privilege, as extensions of that given to legislative and judicial proceedings. McAlister & Co. v. Jenkins, 214 Ky. 802, 284 S. W. 88 (1926) (real estate commission); Stafney v. Standard Oil Co., 71 N. D. 170, 299 N. W. 582, 136 A. L. R. 535 (1941) (Workmens' Compensation Bureau); Bigelow v. Brumley, 138 Ohio St. 574, 37 N. E. 2d 584 (1941) (commission appointed by legislature to prepare and circulate official arguments on proposed constitutional amendment).

[13] 371 Pa. 188, 88 A. 2d 892 (1952). There a letter was sent, having been *released to the press prior to its sending*, by a state attorney general to a district attorney concerning alleged communistic activities of a member of the latter's staff and demanding her dismissal. In a three-to-two decision, the Pennsylvania Supreme Court held both the letter and its release to the press absolutely privileged. Defendant did not plead truth, admitting that plaintiff had been cleared of such charges by a county bar association. The dissenting judges also pointed out that there was no *official* duty requiring defendant to make such publications. *Id.* at 212, 88 A. 2d at 902. This decision has been widely criticized by legal writers. See, *e.g.*, Note, 37 MINN. L. REV. 141 (1953).

possible when unqualified immunity is granted, even to high executive officers.

Absolute privilege, on the one hand, is given to those whose positions or duties are such that they should be completely free to act as they choose, without even the harassment of having to defend against litigations by proving their good intentions. Necessarily, this means that they must be protected from litigation even if their motives are bad. On the other hand, there is the consideration of the right of citizens to be free from unredressable injuries to their reputations, a right which it is the fundamental aim and purpose of the law of libel and slander to protect. Thus the question is one of balance between two conflicting public interests. It would seem that absolute immunity from liability for defamatory publications should be as narrowly restricted as possible.[14]

In the nature of a compromise between the two extremes is the doctrine of "qualified" or "conditional" privilege, where the interest protected is deemed not to be of such importance that the immunity is absolute, but it is of sufficient importance that immunity *is* given, conditioned upon proper purpose and good faith. Conditional immunity is granted in a much wider variety or situations than is absolute immunity—summed up by Baron Parke as those communications "fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned."[15]

Communications on any matters in which the public has an interest are conditionally privileged. Thus public officers, whose duties are undoubtedly affected with a public interest, should be protected by at least a qualified privilege in the discharge of their duties. And it is generally so held.[16] More specifically, the prevention of crime being a matter of

[14] Tanner v. Stevenson, 138 Ky. 578, 128 S. W. 878, 30 L. R. A. (NS) 200 (1910); Comment, *Defamation Immunity for Executive Officers,* 20 U. OF CHI. L. REV. 677, 679 (1953): "The privilege should be confined to those officials whose functions are so necessary that individual rights must be subordinated. Society and the individuals who compose it should not be forced to surrender their rights in return for relatively unimportant services. For offices of less than paramount importance a conditional privilege, sustainable in the great majority of cases, is fully adequate."

[15] Toogood v. Spyring, 1 Cr. M. & R. 181, 193, 149 Eng. Rep. 1044, 1049 (Ex. 1834). "A communication made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty. . . ." Lord Campbell, C. J., in Harrison v. Bush, 5 El. & Bl. 344, 348, 119 Eng. Rep. 509, 512 (K. B. 1855).

The situations covered by the qualified privilege may be categorized roughly as those involving (1) protection of the publisher's interest; (2) protection of an interest of the recipient or a third person; (3) protection of a common interest; (4) protection of a public interest. PROSSER, TORTS § 94 (1941); RESTATEMENT, TORTS §§ 594-598 (1938).

[16] Tanner v. Stevenson, 138 Ky. 578, 128 S. W. 878, 30 L. R. A. (NS) 200 (1910) (school superintendent); Ranson v. West, 125 Ky. 457, 101 S. W. 885

public interest, communications otherwise slanderous are protected if "they are made in good faith in the prosecution of an inquiry regarding a crime which has been committed and for the purpose of detecting and bringing to punishment the criminal."[17] As the conditional privilege is granted to private citizens on this basis,[18] it should surely extend to public agencies[19] and to law enforcing officers.[20]

In accordance with the accepted rules of qualified privilege, the Supreme Court of North Carolina has granted such privilege to defamatory communications, made *by private citizens* to the proper authorities, charging crime,[21] or charging misconduct of public officials[22] and also to such statements made *by private citizens* to other interested persons during the course of investigations into crimes.[23] There is no indication that the North Carolina Court would extend an absolute privilege to law enforcement and other minor public officers for communications made in the discharge of their duties.[24]

In cases in which the conditional privilege is granted, the defendant, in order to be protected from liability for his defamation, must not *abuse* the privilege. That is to say, there are certain conditions which must be satisfied in order to claim this qualified immunity. They can be divided into three somewhat overlapping categories:

(1) there must be no express malice;

(2) there must be a belief of the truth of the communication; and

(1907) ("common school trustees"); Maurice v. Worden, 54 Md. 233, 39 Am. Rep. 384 (1880) (superintendent of U. S. Naval Academy); Peterson v. Steenerson, 113 Minn. 87, 129 N. W. 147, 31 L. R. A. (NS) 674 (1910) (postmaster); Stevenson v. Ward, 48 App. Div. 291, 62 N. Y. S. 717 (4th Dep't 1900) (superintendent of municipal water department).

[17] Eames v. Whittaker, 123 Mass. 342, 344 (1877).

[18] White v. Nicholls, 3 How. 266 (U. S. 1844); Pecue v. West, 233 N. Y. 316, 135 N. E. 515 (1922); *accord,* Stewart v. Major, 17 Wash. 238, 49 Pac. 503 (1897).

The desirability of giving absolute immunity to F. B. I. informers was raised in Foltz v. Moore McCormack Lines, Inc., 189 F. 2d 537 (2d Cir. 1951), *cert. denied,* 342 U. S. 871 (1951). The Court of Appeals, in reversing the district court's order dismissing the complaint, decided that a qualified immunity was adequate.

[19] Peeples v. State, 179 Misc. 272, 38 N. Y. S. 2d 690 (Ct. Claims 1942) (auditors); *In re* Investigating Commission, 16 R. I. 751, 11 Atl. 429 (1887); Hollis v. McCammon, Morris & Pickens, 86 S. W. 2d 652 (Tex. Civ. App. 1935) (auditors).

[20] Morton v. Knipe, 128 App. Div. 94, 112 N. Y. S. 451 (2d Dep't 1908); City of Mullens v. Davidson, 133 W. Va. 557, 57 S. E. 2d 1, 13 A. L. R. 2d 887 (1949); *cf.,* Illinois Cent. R. R. v. Wales, 177 Miss. 875, 171 So. 536 (1937).

[21] Hartsfield v. Harvey C. Hines Co., 200 N. C. 356, 157 S. E. 16 (1931); Briggs v. Byrd, 34 N. C. 377 (1851).

[22] Alexander v. Vann, 180 N. C. 187, 104 S. E. 360 (1920); Logan v. Hodges, 146 N. C. 38, 59 S. E. 349 (1907).

[23] Hartsfield v. Harvey C. Hines Co., 200 N. C. 356, 157 S. E. 16 (1931); Hearn v. Ostrander, 194 N. C. 753, 140 S. E. 724 (1927); Elmore v. Atlantic Coast Line R. R., 189 N. C. 658, 127 S. E. 710 (1925).

[24] *But see* a dictum in Lewis v. Carr, 178 N. C. 578, 580, 101 S. E. 97, 98 (1919): "The publication was not absolutely privileged, for it was not in the performance of *public service,* in which case, notwithstanding proof of the falsity of the charge and actual malice, an action cannot be maintained thereon." (emphasis added)

(3) the privilege must not be "exceeded."

First, defendant will lose his qualified privilege if he makes the publication in the wrong state of mind—*i.e.,* if there is "express malice." The word "malice" has two distinct meanings in the law of defamation: (a) "malice implied in law," a presumption of malice which arises in order to satisfy the technical requirements of the law whenever a defamatory communication is made on an occasion not privileged; and (b) "express malice," or "malice in fact." When the occasion is qualifiedly privileged, it is necessary for plaintiff to prove actual malice in order to recover. It should be noted that the presence of express malice does not destroy the legal justification or excuse which makes the occasion privileged, but it means that defendant has forfeited the defense given to him by the occasion because he used it for a wrongful purpose.[25]

There is some confusion in terminology as to exactly what constitutes express malice. It is said that defendant must be actuated by spite or ill will, "with a design to causelessly or wantonly injure the plaintiff."[26] Other courts stress the necessity for good faith.[27] Mere negligence in making defamatory statements is generally not enough for a showing of actual malice,[28] but wantonness or recklessness may be.[29] Nor is proof of the falsity of the communication, unless defendant knew of it at the time, sufficient evidence to establish malice.[30] Actual malice can best be epitomized as a wrong or unjustifiable motive.[31]

The American Law Institute, in its *Restatement of Torts,* discards the concept of "malice" as unsatisfactory and substitutes the requirement that defendant must "act for the purpose of protecting the particular interest for the protection of which the privilege is given."[32]

[25] Note, 10 NEB. L. BULL. 193 (1931).

[26] NEWELL, SLANDER AND LIBEL § 277, p. 315 (4th ed. 1924); Elmore v. Atlantic Coast Line R. R., 189 N. C. 658, 127 S. E. 710 (1925); Bell v. Bank of Abbeville, 208 S. C. 490, 38 S. E. 2d 641 (1946).

[27] Friedell v. Blakely Printing Co., 163 Minn. 226, 203 N. W. 974 (1925); Lawless v. Muller, 99 N. J. L. 9, 12, 123 Atl. 104, 105 (1923) ("The fundamental test is the bona fides of the communication.").

[28] Pecue v. West, 233 N. Y. 316, 135 N. E. 515 (1922); Peeples v. State, 179 Misc. 272, 38 N. Y. S. 2d 690 (Ct. Claims 1942).

[29] Elms v. Crane, 118 Me. 261, 107 Atl. 852 (1919).

[30] Lewis v. Carr, 178 N. C. 578, 101 S. E. 97 (1919); Ramsey v. Cheek, 109 N. C. 270, 13 S. E. 775 (1891).

[31] Stevenson v. Northington, 204 N. C. 690, 169 S. E. 622 (1933); Riley v. Stone, 174 N. C. 588, 94 S. E. 434 (1917); Krug v. Pitass, 162 N. Y. 154, 56 N. E. 526, 76 Am. St. Rep. 317 (1900); Hallen, *Character of Belief Necessary for the Conditional Privilege in Defamation,* 25 ILL. L. REV. 865, 865-6 (1931).

The malice does not have to be against plaintiff personally, but can be indirect. Stevenson v. Northington, *supra;* Gattis v. Kilgo, 128 N. C. 402, 38 S. E. 931 (1901).

[32] RESTATEMENT, TORTS § 603 (1938). Under this test, the existence of ill will would not be an abuse of the privileged occasion as long as defendant acted to protect or further the privileged interest; conversely, if he did not act to protect that interest, the privilege could be abused even though there was no ill will or spite. See Elms v. Crane, 118 Me. 261, 107 Atl. 852 (1919), illustrating this proposition.

At any rate, it is generally held that the burden of proving actual malice is on the plaintiff,[33] that it is a question for the jury,[34] and that it may be determined from all the circumstances surrounding the communication.[35]

The second condition necessary in order for defendant to claim the protection of the privileged occasion is that he believe his communication to be true. Some courts hold that the test is whether defendant *honestly* believed his statement to be true.[36] Other courts, however, apply a negligence standard—*i.e.*, that defendant must have had reasonable grounds or probable cause for believing his communication true.[37]

The third general requirement is that there not be what may be called an "excess of privilege."[38] Such an excess might be found, for example, if the communication were not within the scope of defendant's official duties,[39] if the statements were irrelevant,[40] if undue publicity were

[33] Kroger Grocery & Baking Co. v. Yount, 69 F. 2d 700 (8th Cir. 1933); Parker v. Edwards, 222 N. C. 75, 21 S. E. 2d 876 (1942); Riley v. Stone, 174 N. C. 588, 94 S. E. 434 (1917).

[34] Riley v. Stone, 174 N. C. 588, 94 S. E. 434 (1917).

[35] "Malice may be proved by extrinsic evidence of personal ill feeling, or by intrinsic evidence such as the exaggerated language of the libel, the character of the language used . . . , the mode and extent of publication, and other matters in excess of the privilege." Friedell v. Blakely Printing Co., 163 Minn. 226, 231, 203 N. W. 974, 976 (1925); Bell v. Bank of Abbeville, 208 S. C. 490, 38 S. E. 2d 641 (1946).

[36] Barry v. McCollom, 81 Conn. 293, 70 Atl. 1035 (1908); Harrison v. Garrett, 132 N. C. 172, 43 S. E. 594 (1903); Joseph v. Baars, 142 Wis. 390, 125 N. W. 913 (1910); Clark v. Molyneux [1877] 3 Q. B. D. 237, 47 L. J. Q. B. 230, 14 Cox., C. C. 10.

However, it is doubtful if even an honest belief will protect statements made recklessly. Joseph v. Baars, *supra*.

[37] Lafferty v. Houlihan, 81 N. H. 67, 121 Atl. 92 (1923); *cf.*, Elms v. Crane, 118 Me. 261, 107 Atl. 852 (1919); Hollis v. McCammon, Morris & Pickens, 86 S. W. 2d 652 (Tex. Civ. App. 1935) ("evidence rendering probable that the auditor was sincere in the report").

The courts often add such requirements, possibly without intending to mean anything more than a bona fide belief of truth. Pecue v. West, 233 N. Y. 316, 322, 135 N. E. 515, 517 (1922); Lewis v. Carr, 178 N. C. 578, 580, 101 S. E. 97, 98 (1919); Ramsey v. Cheek, 109 N. C. 270, 274, 13 S. E. 775, 776 (1891).

Defendant can rely on hearsay and rumor if he communicates them as such and "for what they are worth." Pecue v. West, 233 N. Y. 316, 323, 135 N. E. 515, 517 (1922).

[38] This expression is sometimes used to mean the existence of express malice. As the term is used here, however, it means those things which take the communication outside the privilege as a *matter of law*. "Whether defendant abused or exceeded the privilege of the occasion is . . . a question of law to be determined by the court." Swearingen v. Parkersburg Sentinel Co., 125 W. Va. 731, 743, 26 S. E. 2d 209, 215 (1943); Gattis v. Kilgo, 140 N. C. 106, 52 S. E. 249 (1905). These same factors, on the other hand, might also be considered by the jury as evidence of express malice. See note 35 *supra*.

[39] Hale Co. v. Lea, 191 Cal. 202, 215 Pac. 900 (1923); Stanley v. Prince, 118 Me. 360, 108 Atl. 328 (1919); Jacobs v. Herlands, 17 N. Y. S. 2d 711 (Sup. Ct. 1940), *aff'd*, 259 App. Div. 823, 19 N. Y. S. 2d 770 (2d Dep't 1940); *cf.*, Elmore v. Atlantic Coast Line R. R., 189 N. C. 658, 127 S. E. 710 (1925).

[40] Bohlinger v. Germania Life Ins. Co., 100 Ark. 477, 140 S. W. 257 (1911); Andrews v. Gardiner, 224 N. Y. 440, 121 N. E. 341 (1918); RESTATEMENT, TORTS § 605 (1938).

given to the communication,[41] or if improper or abusive language were used.[42]

Some conclusions may be drawn from the foregoing: (1) It is very doubtful that the North Carolina Court and most other courts would extend the absolute privilege to ordinary law enforcement and investigative officers. Such a privilege probably should not be extended. (2) It may be stated with certainty that a qualified privilege *is* available to such officers in the bona fide discharge of their duties (since it is available to private citizens under similar circumstances), and that adequate protection will be afforded them by the qualified privilege. (3) As long as the defamatory communication is not made from some feeling of personal ill will, and is made as a reasonable man would make it under the circumstances—that is, with a reasonable belief of its truth, without abusive language, and without undue publicity—there is little doubt but that the officer will be immune from liability for that communication.

JOSEPH G. DAIL, JR.

[41] Colpoys v. Gates, 118 F. 2d 16 (D. C. Cir. 1940); Fields v. Bynum, 156 N. C. 413, 72 S. E. 449 (1911).

[42] Ordinarily, violent language used in the communication would be evidence of express malice for the jury. See note 35 *supra*. The only question for the court to decide is whether there is sufficient evidence of malice to go to the jury. The North Carolina Supreme Court's standard here is "not to give the language of privileged communications too strict a scrutiny. 'To hold all excess beyond the absolute exigency of the occasion to be evidence of malice, would, in effect, greatly limit, if not altogether defeat, that protection which the law throws over privileged communications.'" Gattis v. Kilgo, 128 N. C. 402, 412, 38 S. E. 931, 935 (1901).

THE NORTH CAROLINA BAR ASSOCIATION

This year for the first time in its long and illustrious history the North Carolina Bar Association launched a full-scale program of public relations activities designed to emphasize the value of preventive law to the people of North Carolina. While much lies ahead to be accomplished in this field, the achievements this year under the leadership of President William L. Thorp and committees of the Association afford a solid foundation for effective expansion of this program.

Last November the first step in the enlarged program was taken by the employment of a full-time Executive Secretary. He is Charles W. Daniel, native of Wake County, a former newsman, an A.B. graduate of Carolina and a recent law graduate of Wake Forest. The Association established new headquarters in the Capital Club Building in Raleigh.

During the winter months the Association sponsored a state-wide series of weekly radio broadcasts over thirty-one radio stations. The programs, panel-style, were on broad, general legal topics and were well received. It is expected that a new round of radio programs will begin next Fall.

In April the Association inaugurated a series of news columns on general legal subjects in the weekly and daily press on the state. Dr. Robert E. Lee, of the Wake Forest Law Faculty, is author of the articles appearing in the daily papers. Secretary Daniel and Attorneys William Joslin, Thomas F. Adams, Jr. and Ferd L. Davis collaborate in providing articles for the weekly press.

Under the able and effective leadership of J. Spencer Bell, head of the Association's Continuing Legal Education Committee, two excellent institutes have been held to date this year, both at Chapel Hill. The first, in January, dealt with the subject of Small Business Loans and Financing. The second, in March, dealt with three subjects: Estates and Trusts, Federal Rules of Discovery, and Workmen's Compensation. A Tax Institute is being planned by Chairman Leon Rice and his committee to be held during the summer. All continuing legal education activities are conducted by the Association in cooperation with the law schools of Carolina, Duke and Wake Forest.

The Association is cooperating fully with the North Carolina State Bar Incorporated in order to advance the administration of justice and eliminate unauthorized practice of law.

During the year the Association introduced a pocket-sized periodical designated "Bar Notes," containing articles, notes and items of interest

to the Bar generally. The first two issues appeared in January and May, 1954, and were edited by Secretary Daniel.

Other features of the Association's activities include: a legal aid program under the direction of the Association's Legal Aid Committee, headed by Dr. John S. Bradway, of Duke University, in cooperation with the state and county welfare departments; and the work of the Association's Committee on Legislation and Law Reform with respect to legislation to be reported to the Association for recommendation to the General Assembly.

Officers of the Association for the current year are: William L. Thorp, president; Chief Justice M. V. Barnhill, Carroll W. Weathers, and John Manning, vice-presidents; Edward L. Cannon, secretary; Robert H. Frazier, chairman, James K. Dorsett, Jr., Sam B. Underwood, Jr., Joel B. Adams, J. B. Swails, A. W. Kennon, Jr., executive committee, with Messrs. Thorp, Bell and Cannon, ex officio members of the committee.

CARROLL W. WEATHERS
Vice-President